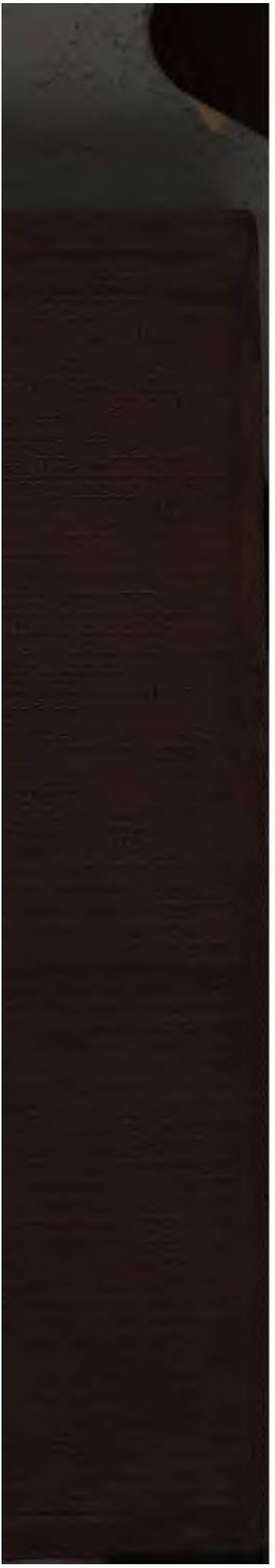

THE

LAW OF MORTGAGE

IN

BENGAL AND THE NORTH WEST PROVINCES.

BY

ARTHUR GEORGE MACPHERSON, ESQ.,

OF THE INNER TEMPLE, BARRISTER AT LAW,
NOW ONE OF THE JUDGES OF HER MAJESTY'S HIGH COURT AT CALCUTTA.

FIFTH EDITION,

BY

NINIAN HILL THOMSON, ESQ., M. A.

ADVOCATE.

CALCUTTA:

THACKER, SPINK & Co. BOMBAY: THACKER, VINING & Co.
LONDON: W. THACKER & Co.

1868.

PRINTED BY C. B. LEWIS, AT THE BAPTIST MISSION PRESS.

ADVERTISEMENT TO THE FIFTH EDITION.

The fourth edition of this Treatise,—which was merely a re-issue of the third,—being out of print, advantage has been taken of the opportunity to prepare an entirely new edition incorporating the decisions of the Courts down to the commencement of the present year. The work remains substantially unchanged: but many additions and alterations have been rendered necessary by the decisions referred to, some of which are very important.

The Decisions of the Privy Council have of late, through the medium of various publications, become so much more widely known than they formerly were, that it has been deemed unnecessary to print in the Appendix the two judgments which have appeared there in former editions.

N. H. T.

Calcutta, July 31*st*, 1868.

CONTENTS.

ABBREVIATIONS.

Sel. Rep. Reports of Select Cases decided in the Calcutta Sudder Dewanny Adawlut from 1791 to 1848.

S. D. A. Decisions of the Calcutta Sudder Dewanny Adawlut recorded in conformity with Act XII of 1843.

N. W. P. Ditto, North-Western Provinces.

Rep. Sum. Cases. Reports of Summary Cases decided by the Calcutta Sudder Court.

Marsh. Marshall's Calcutta High Court Reports (1862 and 1863).

Hay. High Court Reports (1862 and 1863) published by G. C. Hay & Co.

W. R. Sutherland's Weekly Reporter containing reports of cases decided by the Calcutta High Court.

W. R. sp. Sutherland's special volume of Reports of Cases decided from July 1862 to July 1864.

W. R. 1864. Sutherland's Reports of Cases decided in 1864 (prior to commencement of Weekly Reporter).

Ind. Jur. Indian Jurist, New Series (1866 & 1867).

Hyde. Hyde's Calcutta High Court Reports (1862—1864).

Bourke. Bourke's High Court Reports.

Agra. Reports of Cases decided in the High Court of the North West Provinces, edited by Hunooman and Lalita Pershad.

Agra F. B. Ditto, Full Bench Decisions.

Moore's Ind. Ap. Moore's Indian Appeal Cases decided by the Privy Council.

Mad. or *Madras.* Madras High Court Reports, edited by Stokes, &c.

Bombay. Bombay High Court Reports.

Boulnois
Fulton } Calcutta Supreme Court Reports.
Morton

Tayl. & B. Tayler and Bell's ditto.

CORRIGENDA.

P. 38, line 9 from top: Insert "*of*" after "*is that*" &c.
P. 98, last line: For "*intrust,*" read "*interest.*"
P. 120, line 12 from top: For "*clause* 5" read "*clause* 15."

INTRODUCTORY CHAPTER.

A MORTGAGE may be defined as a pledge, for securing a debt, of lands of which the debtor and those claiming under him remain either the actual owners, or in a position to assert their rights as actual owners, until debarred by judicial sentence or by legislative enactment. Mortgages of land have long been in use all over India, and are well known in Hindu and Mahomedan law.

The Mahomedan law made no distinction between mortgage of land and pledge of other property (*a*). Possession or seisin of the thing pledged, was in all cases the essence of the security: and hypothecation, the giving a lien over a thing without actual possession of it, seems to have been originally unknown. All that was required in order to give validity to the contract, was that possession should be once given so as to evidence the fact of the mortgage having been made. And a mortgage did not come to an end on the mortgagee's going out of possession, if he did not do so with the intention of relinquishing his security (*b*): nor was the right of a mortgagee who had obtained possession, injured by his being subsequently ousted by the mortgagor. Although possession was necessary in order to complete the mortgagee's title, it seems that he was not entitled to the use, or to the actual enjoyment of the profits of the property pledged, except by special agreement (*c*).

(*a*) Macnaghten's Mahomedan Law, p. 74.

(*b*) *Ibid.* p. 354.

(*c*) *Ibid.* p. 74.

A mortgagee or pledgee in possession had priority over other creditors with respect to the property pledged, and was entitled to satisfy his debt thereout, before it could be applied to the liquidation of other claims: the surplus only which remained after discharging the mortgage debt being divisible among other creditors (*d*).

The taking of interest was forbidden among Mahomedans, but the property pledged was always presumed to be in value equivalent to the debt due; and the mortgagee might in fact thus obtain, so long as he kept it in his own hands, what was of greater value than the sum lent (*e*).

The mortgagee could not, except by the consent of the mortgagor, at any time sell the property in pledge; at least, if he sold it for more than the principal due upon the loan, he had to account to the mortgagor for what he received in excess of that sum (*f*).

The mortgagor could not dispose of the property mortgaged without the consent of the mortgagee. Such a sale was legally valid, but its operation depended entirely on the pleasure of the mortgagee, unless the purchaser paid off the mortgage debt, which he was entitled to do, or the mortgage was from some other source redeemed (*g*). But the consent of the mortgagee confirmed any such disposition, so that if the mortgagor sold to two persons in succession, and the mortgagee recognised the second sale only, that sale took priority over the first (*h*).

No partial payment of the mortgage debt affected the mortgagee's right over the whole property pledged: and the mortgage remained in force, not only until redemption, but until the mortgagee in consequence of the redemption actually gave possession of the property to the mortgagor (*i*).

The Hindu law likewise recognised no distinction

(*d*) Macnaghten's Mahomedan Law, pp. 75, 347.
(*e*) *Ibid.* p. 74.
(*f*) *Ibid.* p. 74.
(*g*) Macnaghten's Mahomedan Law, p. 176.
(*h*) *Ibid.* p. 355.
(*i*) *Ibid.* p. 356.

between mortgages of land and pledges of other property (*j*), and the pledge might be for a limited or for an unlimited time, and either usufructuary or for custody only. Actual possession was probably originally (*k*) essential to their validity, but there is little doubt that hypothecation has existed in the country from a remote period (*l*). When no date was specified for redemption, a mortgage might be redeemed at any distance of time, no title by prescription being acquired by the mortgagee in possession (*m*).

A mortgagee in possession had priority over all other mortgagees, if he obtained possession without force or fraud (*n*). The offence of one who, having mortgaged his property, afterwards fraudulently made a mortgage of it to another, was looked upon as a crime worthy of "whipping," "punishment for theft," "punishment as a robber," and even death (*o*).

Although such generally were the principles which regulated mortgages amongst Hindus and Mahomedans, many changes and modifications appear to have been from time to time introduced; and there is much inconsistency in the various doctrines laid down in the books. In Hindu law there are numerous written texts in which possession is declared to be absolutely necessary, in order to give validity to a contract of mortgage; as for example,—"By the acceptance or actual possession of a pledge, the validity of the contract is maintained" (*p*). "Pledges are declared to be of two sorts, immoveable and moveable, and both are valid when there is actual enjoyment, and not

(*j*) Colebrooke's Digest, v. 1, chap. 3, Tit. "Pledge," p. 140.

(*k*) *Ibid.* pp. 140—202.

(*l*) Strange's Hindu Law, v. 1, p. 288.

(*m*) Colebrooke's Digest, v. 1, p. 183: Strange's Hindu Law, v. 1, p. 290.

(*n*) Colebrooke's Digest, v. 1, p. 211.

(*o*) *Ibid.* pp. 209, 210: Gentor, Sec. 2.

(*p*) Colebrooke's Digest, v. 1, p. 161. Yajnyawalcya.

otherwise" (*q*). On the other hand there are texts, although they are fewer in number and perhaps of less authority, some of them partially, others of them absolutely in opposition to these :—" Of him who does not enjoy a pledge, nor possess it, nor claim it on evidence, the written contract for that pledge is nugatory, like a bond when the debtor and witnesses have deceased" (*r*). " But if there be no occupancy, but a writing exist duly attested and so forth, the writing shall prevail, because it is the best evidence of a transaction : it shall establish the mortgage" (*s*). It is evident that the original doctrine had been considerably modified, and that, whatever may have been the case at first, a valid mortgage unaccompanied by possession, was a thing in later times not unknown in the Hindu law.

A strong argument in favor of the conclusion that possession is not demanded by either the Hindu or the Mahomedan law as we found them existing in this country, may be drawn from the fact that all the legislation of the English Government on the subject, has proceeded on the basis that mortgages are alike valid whether accompanied by possession or not. The earlier legislation of the East India Company, did not profess to introduce new principles of law into the country, but rather to express and provide a better mode of enforcing those which already prevailed. The Regulations then enacted may therefore, so far as regards general principles, be presumed to be an embodiment of the law which was found prevailing : and as they in no degree recognise any necessity for the mortgagee's being put in possession, it may reasonably be inferred that according to the law of the land no such necessity existed, either among Hindus or Mahomedans.

One learned writer on Hindu law, adopting apparently a

(*q*) Colebrooke's Dig. p. 205. Vayasa.

(*r*) *Ibid.* p. 205. Vrihaspati.

(*s*) Colebrooke's Dig. v. 1, p. 215. Helayudha.

suggestion made by Sir William Jones, goes even so far as to think, that notwithstanding all that is said about the necessity of the delivery of possession in order to give validity to a mortgage, it is not unlikely that the mode of pledging without giving possession,—*i. e.* hypothecation,—originated among the Hindus (*t*).

The question as to the necessity for the delivery of possession (which the Regulations put beyond doubt in the Mofussil Courts) was on several occasions raised and discussed in the late Supreme Court under the Statute (*u*), which enacts that in hearing and determining actions or suits between Mahomedans or between Hindus, all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Hindus by the laws and usages of Hindus: and when only one of the parties shall be a Hindu or Mahomedan, by the laws and usages of the defendant. At one time it was held that a mortgage between Hindus was invalid, where there had been no possession (*v*). But these cases were overruled, and the Court always subsequently recognised the validity of, and gave full effect to Hindu mortgages, whether accompanied by possession or not (*w*).

The forms in which mortgage securities were given, seem to have been the same as those now in use: and the earlier Regulations shew that the usufructuary mortgage, and the mortgage by conditional sale, were of common occurrence prior to their enactment.

The law which now governs mortgages in the Mofussil Courts, is to be found in the Regulations, and in the decisions of the Courts: and bare questions of

(*t*) Sir T. Strange, v. 1, p. 288.

(*u*) 21 Geo. 3, Chap. 70, Sec. 17.

(*v*) *Sibnarain Ghose* v. *Russickchunder Neoghy*, Morton's Rep. p. 105.

(*w*) *Colly Doss Gungopadhya* v. *Sibchunder Mullick*, Morton's Rep. p. 111: *Sibchunder Ghose* v. *Russick Neoghy*, Fulton's Rep. p. 36.

Hindu or Mahomedan law rarely if ever arise (*x*). The law on the subject all bears date since the year 1780, when the legislature seems first to have interfered in the matter indirectly by an Act then passed, limiting the amount of interest which the lender of money might legally receive. One form of mortgage, which before that time was much in vogue, was of a very simple nature. The lender received from the borrower a piece of land, receiving the profits in lieu of interest, and retaining possession until the loan was paid off by the mortgagor; the risk of loss in bad years was set off against the profits of good years; no question arose as to the precise sum received by the mortgagee, who was not bound to render any account: and the mortgagor was personally liable for the payment of the principal, but not for any thing further. The Regulation above referred to, however, and subsequent enactments (*y*), changed the character of such securities, and introduced a close system of accounting, applicable to all mortgages made before Act XXVIII of 1855 came into force. They declared that no more than 12 per cent. per annum should be allowed as interest on any mortgage; that all sums received by the mortgagee in excess of 12 per cent., should go to the account of principal; and that whenever he had received a sum amounting to the principal with legal interest, the mortgage should be considered as cancelled and redeemed. In legislating on the subject of mortgages, the Government has for the most part been guided by a desire to protect the debtor against his creditor, and, acting on this principle, does not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer,—unless such transfer be by the direct and immediate act of the proprietor himself (*z*).

(*x*) S. D. A 1848, p. 530: N. W. P. v. 7, p. 88.

(*y*) Reg. XV. 1793, Sec. 10: Reg. XXXIV. 1803, Sec. 9: Reg. XVII. 1806, Sec. 6.

(*z*) S. D. A. 1847, p. 354: N. W. P. v. 8, p. 447.

CHAPTER II.

OF THE VARIOUS KINDS OF MORTGAGES.

THERE are various kinds of mortgages now in common use throughout Bengal and the North West Provinces, each kind being attended with rights and liabilities peculiar to itself. In one, the regular payment of the interest of the money advanced is well secured to the mortgagee, while the principal is not recoverable at any fixed period, nor in one sum, but is only gradually to be liquidated from what is received from the land by the mortgagee, in excess of the interest he is entitled to, the mortgagor not being personally liable for the re-payment of either principal or interest. In another, the lien which the mortgagee has over the property, gives him no security for the regular payment of interest, but the mortgagor is personally liable for that and for the principal, which are, after a certain time, recoverable in one sum, either from the mortgagor or from the mortgaged property, the latter being liable to be sold, and the proceeds of its sale being applicable in the first instance towards the liquidation of the mortgage debt. In a third, there is no security for the regular payment of interest, nor is the mortgagor personally liable for that, or for the principal, but, on default being made, the whole property passes away from the mortgagor, and vests absolutely in the mortgagee.

Whatever may be the form adopted, the mortgage is subject to the incidents attached by law to that form: and this, it would seem, notwithstanding any stipulations to the contrary, which the parties may have made between themselves (*a*).

(*a*) See N. W. P. v. 8. p. 161.

There are five different kinds of mortgages. Three of these are simple and pure forms, wholly distinct from each other in their nature and properties (*b*). The others are merely combinations of the simple forms, and are governed by the rules laid down as to these forms, according as the particular matter in question belongs rather to one form than to another.

The three pure forms are (*c*),—*the usufructuary mortgage*, —*the simple mortgage*,—*the mortgage by conditional sale*, kut-kubala, or bye-bil-wufa.

I. *The usufructuary mortgage*:—Where a man borrows money and gives up his land to the lender, who (unless his debt is paid off by the mortgagor) may retain possession until he has, from the rents and profits of the land, repaid himself the interest, or, according as the terms of the agreement in each case may be, the principal and interest of the sum advanced by him. Where the whole debt is to be satisfied out of the rents and profits, the mortgage corresponds with the original *vivum vadium* of the English common law: where the interest alone is to be liquidated from them, the case resembles that of a Welch mortgage (*d*).

Of usufructuary mortgages there are two kinds, namely, mortgages of the whole right and estate of the mortgagor, and mortgages of his right and estate for a term of years only.

Zur-i-peshgee leases, or leases granted on a sum of money being advanced, are on the same footing as pure usufructuary mortgages, and are dealt with as such (*e*);

(*b*) S. D. A. 1847, p. 354. See N. W. P. v. 8, p. 447.

(*c*) S. D. A. 1847, p. 354.

(*d*) Coote on Mortgages, p. 4. A "bhog-bundhuk" in the North West Provinces is a mortgage with possession, in which the thing pledged is considered an equivalent for interest. N. W. P. 1855, p. 341.

(*e*) 4 Sel. Rep. p. 251: S. D. A. 1847, p. 167: 1852, pp. 280, 304: 1857, p. 1232: 1859, p. 977: 2 Hay, p. 159: 6 W. R. p. 6: N. W. P. v. 8, p. 107: v. 10, p. 355.

but this is only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves in fact intended the transaction to be one in the nature of a mortgage (*f*).

Thus a lease at a yearly rent of 214 rupees, from which a deduction of 111 rupees was to be made on account of interest, and in which it was stipulated that "if on the expiration of the lease, the loan should not be repaid, the lease should continue," was held to be a zur-i-peshgee lease to be dealt with as a mortgage (*g*).

When a mortgage is given by way of lease, the loan is generally made re-payable on the same day that the lease expires, and the deed usually contains a stipulation, that if default is made, the lender and lessee shall continue in possession on the terms of the lease, until the debt is repaid from the profits of the land or otherwise. If by the terms of the contract, the mortgagee is to look to the usufruct of the land for the payment of both principal and interest, the mortgagor is not personally liable for the payment of either, in the absence of a special agreement that he shall be so. And it would seem to have been held that even where the application of the profits was expressly limited to the liquidation of interest, the mortgagor was not personally liable for the principal. There is little doubt, however, but that in this last case the mortgagor is liable for the principal, especially in a contract made subsequent to the passing of Act XXVIII of 1855 (*h*).

The mortgagor has the right of redemption on liquidation of the debt, either from the usufruct, or by a cash payment or deposit in Court (*i*).

Before Act XIV of 1859 came into operation the usufructuary mortgagee never could become absolute owner of the

(*f*) S. D. A. 1855, p. 481 : N. W. P. v. 8, p. 356 : v. 10, p. 355. See S. D. A. 1857, p. 1232.

(*g*) 2 Hay, p. 159.

(*h*) N. W. P. v. 3, p. 211 : 1 Sel. Rep. p. 121.

(*i*) S. D. A. 1847, p. 354.

mortgaged estate, and the right of redemption remained to the mortgagor and his representatives after any lapse of time, however great. But the right to redeem may now become barred under section 1, clause 15 of that Act, in which it is provided that the period of limitation to suits against a mortgagee of immoveable property, for recovery of the same, is sixty years from the date of the mortgage or from the date of a written acknowledgment of the mortgagor's title or right of redemption given by the mortgagee and signed by him.

II. *The simple mortgage* :—Where the borrower binding himself personally for the re-payment of a loan with interest, pledges his land as a collateral security for such re-payment.

He does not give up possession of the property to the mortgagee, or permit him to enjoy the usufruct of it, nor does he covenant to make an absolute transfer of it in the event of non-payment. On default, the mortgaged estate does not at once pass into the hands of the mortgagee, nor does it of necessity do so at all. The mortgagee enforces his security by suing the mortgagor for what is due on the loan as principal and interest, and for a declaration that he has a lien on the land for the debt, and that he has a right to enforce it by sale of the property. Having obtained a decree, he proceeds in execution to sell the land, and out of the proceeds of the sale to satisfy his claim, the mortgagor being entitled to any surplus which may remain. The mortgagee may himself be the purchaser if he chooses (*j*). From the date on which the money advanced is in the agreement declared to be repayable, up to the time of decree and sale, the mortgagor has the right of redeeming on payment of the balance due in respect of principal and interest: that right, however, necessarily becomes extinct on a sale taking place.

The mortgagor in the case of simple mortgages, is liable to lose his land, but it does not thereupon vest in the mortgagee.

(*j*) N. W. P. v. 6, p. 218.

III. *The mortgage by conditional sale, kut-kubala, or bye-bil-wufa*, is that in which the borrower, not making himself personally liable for re-payment of the loan (*k*), covenants that on default of payment of principal and interest on a certain date, the land pledged shall pass to the mortgagee.

If the debt is not paid as stipulated, the mortgagee can have the property transferred absolutely to him. For this purpose he must proceed to foreclose, according to certain prescribed rules, converting the conditional sale into an absolute one, and obtaining possession. Until he takes such proceedings, the mortgagor remains in possession and enjoyment of the property, and has the right of redemption on paying off what is due on the mortgage; but on foreclosure, that right ceases, and the property passes wholly from the mortgagor and vests in the mortgagee.

In mortgages by conditional sale, the mortgagor is liable to lose his estate, and when he does so, it passes at once to the mortgagee.

Combinations of these three pure forms give rise to two other kinds of mortgage, the one being the simple mortgage usufructuary, and the other the conditional mortgage usufructuary.

IV. *The simple mortgage usufructuary* is that in which, though the property is only collaterally pledged, as in the case of a pure simple mortgage, the mortgagee is permitted to have the usufruct of it. This may be done either by simply allowing him to receive the rents and profits, or by giving him a lease for a limited period. In either case, the proceeds are credited to the mortgagor against interest, and, if they exceed what the mortgagee is entitled to for interest, against principal also. As in a pure simple mortgage, the mortgagor is personally liable, and his estate subject to be sold on default, though redeemable until it is so sold.

(*k*) 7 Sel. Rep. p. 92.

V. *The bye-bil-wufa or kut-kubala usufructuary* :— Where the mortgagee by conditional sale has the usufruct of the property, either by being merely put in possession and allowed to receive the rents and profits, or by having a lease given to him by the mortgagor. The position of the parties up to the date on which the loan is re-payable, is in all respects the same as in a pure usufructuary mortgage. From that date their position resembles what it would be in a pure conditional mortgage. But the mortgagee is in the receipt of the profits of the land. Until he has obtained a decree for foreclosure, he must account for such receipts, unless his mortgage was made after the passing of Act XXVIII of 1855, and the agreement is that the usufruct should be taken in lieu of interest. The mortgage is redeemed or cancelled whenever, prior to his obtaining a decree for foreclosure, the mortgagee has received a sum equal to the principal with interest at a rate not higher than 12 per cent. per annum, or (if the contract was entered into subsequent to the passing of Act XXVIII of 1855) whenever he has received the principal with interest at the stipulated rate, or at such rate as the Court shall think proper if there be no stipulation on the subject.

CHAPTER III.

OF PERSONS CAPABLE OF MORTGAGING.

THE right to mortgage is *primâ facie* incident to the right of property, and co-extensive with it; but to this rule there are exceptions in the cases of lunatics and minors. Persons whose rights are of a limited or qualified nature, cannot do any valid act in excess of these rights. Thus a Hindu widow, holding property belonging to her husband's estate which devolved to her in succession upon his death, cannot, except under certain circumstances, make a mortgage which will be valid against the heirs in reversion of the husband. And if the estate is ancestral property belonging to a Hindu family where the doctrines of the Mithila school or the Mitakshara prevail, and has been mortgaged without the consent of all those interested in it, or if the land is mal-i-wuqf or dewuttur, devoted to religious purposes, a mortgage of it may generally be set aside.

Minors are incapable of executing a mortgage of their property so as to bind themselves. But a mortgage by a minor's legal guardian is valid, and will be sustained, if made *bonâ fide*, and for the benefit of the minor or of his property (*l*).

A guardian who mortgages his ward's property, ought to do so in his character of guardian, and not as if he were

(*l*) Sel. Rep. v. 4, p. 339: v. 5. p. 980; N. W. P. v. 6, p. 234. See p. 82; S. D. A. 1846, p. 371: 1856, S. D. A. 1856, p. 392.

himself proprietor (*m*). So a sale of land made by certain persons, not as guardians on behalf of a minor (which was their real character), but as joint proprietors, was declared invalid. The Court said that all the parties who appeared as sellers were wrongly described, and that a deed vitiated by so serious a flaw could not be regarded as conveying a good and sufficient title (*n*).

But the leading case on this subject is that of *Hunoomanpersaud Panday*, in the Privy Council. A Ranee, the guardian of, or manager for her minor son, mortgaged ancestral lands which had on his father's death descended to the son as heir. In the mortgage deed she was described not as guardian or manager but as being herself absolute proprietor, and the deed was in consequence set aside by the Agra Court (*o*). But on appeal to the Privy Council this decision was reversed (*p*). Their Lordships remark, with reference to the point of the mother having described herself as proprietor instead of a guardian or manager, that the Lower Court "did not enter upon the question of the validity of the charge in whole or in part, as a charge effected by a *de facto* manager or proprietor whether by rightful or wrongful title, nor advert to the fact that the charge included some items of former charge wholly unaffected by the objection which they considered of such weight." And after some further observations they continue, "it is not suggested that she ever claimed any beneficial interest in the estate as proprietor: had she done so, it would have been *pro tanto* a claim adverse to her son: and it is conceded that she did not claim adversely to her son. The terms 'proprietor' and 'heir' when they occur, whether in deeds or pleadings or documentary proofs, may indeed by a mere adherence to the title be construed to raise the conclusion of an

(*m*) S. D. A. 1848, p. 791: N. W. P. v. 8, p. 156.
(*n*) N. W. P. v. 8, p. 156.
(*o*) N. W. P. v. 7, p. 21.
(*p*) 6 Moore's Ind. Ap. p. 393.

assumption of ownership in the sense of beneficial enjoyment derogatory to the rights of the heir: but they ought not to be so construed, unless they were so intended, and in this case their Lordships are satisfied that they were not so intended. They consider that the acts of the Ranee cannot be reasonably viewed otherwise than as acts done on behalf of another, whatever description she gave to herself, or others gave to her, and that she must be viewed as a manager inaccurately and erroneously described as 'proprietor' or 'heir:' and it is to be observed, that the Collector takes this view, for whilst he remarks on the improper description of her as heir, or proprietor, he continues her name as 'Surberakar.' If the whole context of all these documents and pleadings be taken into consideration, and the construction proceed on every part, and not on portions of them, they are sufficient in their Lordships' judgment to show the real character of her proprietorship."

On the general question of the power of a minor's guardian or manager to mortgage the minor's estate, and of the degree to which the *onus* is thrown on the mortgagee of proving that the charge was created for the benefit of the minor and from necessity,—their Lordships thus lay down the law: "The power of the manager for an infant heir to charge an estate not his own, is under the Hindu law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course if that danger arises, or has arisen, from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity

which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected though it be shown that with better management the estate might have been kept free from all debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does not so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that under such circumstances he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bonâ fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived" (*q*).

The question as to the existence of a necessity must be decided upon the evidence in each case as it arises. It has been held that, as the performance of the father's *shrad* is incumbent on the son, where there are no other funds available for the purpose, money may properly be lent to the son, though a minor, in order to enable him to perform his father's *shrad* suitably (*r*).

(*q*) See W. R. 1864 p. 166 : 6 W. R. pp. 30, 262 : 7 W. R. p. 23 : 8 W. R. p. 364 : 9 W. R. p. 297.

(*r*) 6 W. R. p. 24. As to what amounts to "necessity,"—see *post* as to alienations by members of a joint Hindu family and by a childless Hindu Widow.

Due care and attention must be used by a mortgagee or purchaser dealing with a minor or his guardian: and the mere absence of any fraudulent intention is not sufficient. The *bona fides* of the mortgagee or purchaser is a matter which must be determined in each case. A sale by a guardian of a minor having been set aside on the ground that the sale was not warranted by law, as made without necessity, the purchaser appealed to the High Court urging that he acted *bonâ fide*, and that there was no express finding of the Lower Court that he acted otherwise. But the appeal was dismissed, the Court observing,—"We think the finding of the Lower Court, although it does not amount to a finding of fraud or collusion on the part of the purchaser, is substantially a declaration that he did not act *bonâ fide*, that is to say, that if in fact he believed that there was a legal necessity for the sale which the guardian was making, he had not exercised due care and attention in arriving at that belief. **** It seems clear that the purchaser cannot have made any real attempt to satisfy himself as to the necessity for the sale. He is therefore not a purchaser who is protected by the ruling of the Privy Council in the case of *Hunoomanpersaud Panday*" (*s*).

And when a person after attaining majority, questions a sale of his property made by his guardian during his minority, the *onus* lies on him who upholds the purchase, not only to show that under the circumstances of the case the guardian had the power to sell, or that the purchaser reasonably supposed he had the power, but further to show that the whole transaction so far as regarded the purchaser was *bonâ fide* (*t*).

A mortgage made by a guardian is in all cases valid, if ratified by the minor after attaining his full age (*u*). But if the minor immediately upon his attaining his full age sells an estate previously mortgaged by his guardian, no

(*s*) 5 W. R. p. 103. See 2 Agra, p. 147. (*u*) S. D. A. 1853, pp. 494. 525.
(*t*) 9 W. R. p. 297: 6 W. R. p. 262.

subsequent ratification by the minor of the guardian's act will be of any avail (*v*).

Without such ratification, money advanced to a guardian for what the Court does not consider to be for the minor's benefit, as, for example, money advanced to carry on excessive litigation, will be considered as having been obtained by the guardian on his own personal responsibility (*w*).

The rules applicable to alienations of the property of a ward by his guardian or manager may also be applied to alienations by an executor or manager appointed by the will of a Hindu or Mahomedan.

The Hindu executor of a deceased Mahomedan borrowed money to pay off a debt for which certain property belonging to the testator's estate was about to be sold. As security for the money so borrowed, he gave a mortgage of certain property belonging to the estate. The mortgagee having sued on his mortgage bond, the parties beneficially interested disputed the mortgage on the ground that the loan was not *necessary*, not contracted in order to save the estate, inasmuch as at the time it was made, a large amount of money was in the hands of the executor. It was held, on appeal to the High Court (*x*), that even if the executor had funds in hand with which he might have paid off the original debt without borrowing from the plaintiff, that fact would not invalidate the plaintiff's claims against the estate, unless there were good reason to infer that he knew of these funds, or might have known of them, if he had exercised ordinary diligence on the point.

In another case, a mortgage granted by the executor of a Hindu was set aside and declared null and void as against the heirs (*y*). The executor, Doorgapersad, in borrowing the money and granting the mortgage, acted contrary to the pro-

(*v*) S. D. A. 1858, p. 312.
(*w*) S. D. A. 1853, p. 531.
(*x*) W. R. 1864, p. 99.
(*y*) 3 W. R. p. 7 (Misc.) *note*, Bourke, p. 48 (Ap.)

visions of the will of the testator: and the mortgagees in lending the money, made no sufficient inquiries as to the circumstances under which the executor was contracting the loan. The Chief Justice (z) in delivering the judgment of the Court said,—"Under the will, Doorgapersad had no right to create this mortgage. Although Doorgapersad became the 'attorney' or executor under the will of Rajmohun (the testator) he had not, according to Hindu law, the same power over the estate of Rajmohun, moveable and immoveable, which an executor would have over leasehold estate according to English law. We think that, according to Hindu law, an *attorney* or executor under a will, has no greater power over immoveable estate than a manager,—which, according to the decision of the Privy Council in the case of *Hunoomanpersaud Panday*, is a limited and qualified power. And further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will. If, therefore, Doorgapersad had the power to mortgage for specific purposes, it would have been the duty of the lender to inquire into the circumstances under which the estate was about to be mortgaged, and whether the executor had authority under the will to effect such a mortgage."

According to the Mitakshara and Mithila law, the alienation of joint undivided property is invalid without the assent of all the sharers, and, without such assent, such alienations have been held not to be valid even for the seller's own share. Therefore when a mortgage of joint property was made by the three sharers, but one of them was a minor and his assent could not be legally given, the mortgagee's claim against the two proprietors, who were of full age, as well as against the minor, was held to be invalid (a). Nor can the head of a Hindu family alienate joint property

(z) Sir Barnes Peacock. S. D. A. 1847, p. 557 : 4 Sel. Rep. p. 158.

(a) S. D. A. 1853, p. 344. See

during the minority of any brother, or without the consent of those brothers who are of age (*b*). A father of a joint Hindu family cannot alienate ancestral property during the minority of his sons, or, if they are of full age, without their consent (*c*).

To these rules there is an exception, where the alienation is made from necessity or for the manifest benefit of all interested (*d*). Under the head of alienations from necessity may be ranked those made for the support of the family, for the services of religion (*e*), for the payment of Government revenue, or for any 'pressing need.' Where decrees obtained by creditors were in execution against the father of a family, and the ancestral property had been advertised for sale in satisfaction of these decrees, and the father had been fined and was in jail under a criminal prosecution: it was considered that the necessity of the case justified an alienation of part of the property, in order to raise money to pay the fine imposed on the father, and to save the remainder of the estate from sale (*f*). And it has been said that the necessities which may arise for such transfer, need not be connected with the ancestral debt (*g*). But only so much of the property should be sold as is sufficient to meet the claim, and if a larger portion than is absolutely required is sold, it must be shewn by the purchaser that the money required to pay off the claim could not be raised otherwise (*h*). This last rule, however, does not apply to cases in which the excess is comparatively small (*i*).

In a case in which the ostensible purpose of the loan was to pay off Government Revenue, the Court ruled that in order to render such a loan binding upon those who had reversionary interests in the property, it must be satisfactorily proved that the loan was at the time absolutely

(*b*) Fulton's Rep. p. 368, note *a*. See 5 W. R. p. 221: 7 W. R. pp. 298, 502.

(*c*) 6 Sel. Rep. p. 71. See S. D. A. 1853, p. 344.

(*d*) Fulton's Rep. p. 380.

(*e*) See 5 Sel. Rep. p. 24.

(*f*) N. W. P. v. 5, p. 327.

(*g*) N. W. P. v. 6, .p. 414.

(*h*) S. D. A. 1861, v. 1, p. 193.

(*i*) 8 W. R. p. 75. See 9 W. R. p. 108.

necessary from failure of the resources of the estate itself, and was not raised through the caprice or extravagance of the proprietor (*j*). More recently, the Courts have acted upon the general principles laid down by the Privy Council in the case of *Hunoomanpersaud Panday* (*k*), and have held that where the debt had been contracted under circumstances of great pressure and for the benefit of the estate, the lender's title was a good one and could not be affected by the waste or mismanagement of the borrower (*l*).

Although it may not be necessary for the mortgagee or purchaser to see to the application of the money paid by him, still it is necessary for him to make due inquiry as to the necessity to borrow or sell. The Court remark in one case, "If the necessity existed, or if the purchaser from inquiries *bonâ fide* made, was led to believe that a necessity to sell existed, the sale would not be invalidated by the vendor's failing to apply the money properly: but no necessity is proved, nor is it shewn that any reasonable or proper inquiry was made by the kinsman purchaser as to whether there was any necessity"(*m*).

When three brothers sued to set aside a sale made by their elder brother when they were minors, it was held that the plaintiffs must make out a *primâ facie* case against the sale(*n*). But there is no doubt that in cases of this class the *onus* is in the first instance usually on the defendant.

Where money was borrowed by a near relative of a joint Hindu family (holding part of the ancestral property and appearing before the world as a coparcener of the family), to pay a *bonâ fide* ancestral debt, the loan was held to be a family debt, not merely a debt for which the borrower was personally liable (*o*).

Those who dispute a conveyance of this kind, can do so, only by bringing a suit to have it declared illegal and

(*j*) S. D.A. 1858, p. 802.
(*k*) 6 Moore's Ind. Ap. p. 393. See p. 15 *supra*.
(*l*) S. D. A. 1859, p. 1643: and see p. 376: 3. W. R. p. 122.
(*m*) 6 W. R. p. 193.
(*n*) W. R. 1864, p. 37.
(*o*) 7 W. R. p. 490.

void, on the ground of the property being ancestral: and a suit brought in their father's lifetime, by sons for possession as proprietors on account of illegal alienation by their father, will not be entertained. A son's proprietary right in ancestral property was formerly held not to arise until after the death of his father (*p*), unless the father had expressly relinquished his rights (*q*). More recently, however, it has been decided that according to the Mitakshara law, a son acquires by birth a right in ancestral property, and can during his father's lifetime compel a partition of such property,—that the father cannot without the consent of the son alienate such property except for sufficient cause, and the son may not only prohibit the father from so doing, but may sue to set aside the alienation if made,—that the cause of action to the son accrues when the purchaser takes possession,—that a new cause of action does not upon the subsequent birth of a younger brother, accrue either to the elder brother alone, or to him and the younger brother jointly,—and that a son cannot set aside alienations made before his birth (*r*).

Where a son sues to recover property sold by his father on the ground that the sale was made under such circumstances as not to be binding on him, if it is proved to the satisfaction of the Court that the purchase money was carried to the assets of the joint estate, and that the son had the benefit of his share of it, the son cannot recover his share of the estate without refunding his share of the purchase money. So, if it is proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate, which was binding upon the son, and the purchase money was applied in freeing the estates from this incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not compel the immediate discharge

(*p*) N. W. P. v. 7, pp. 311, 365 : v. 6, p. 414 : S. D. A. 1851, p. 352 : 1857, p. 67 : 1850, p. 282.

(*q*) 6 Sel. Rep. p. 65.

(*r*) 8 W. R. p. 15, a Full Bench decision. See 1 Mad. p. 77.

of it: and the decree for the recovery by the son of the ancestral property or of his share in it, as the case might be, would be to hold it subject to the incumbrance (*s*).

In Bengal a Hindu widow who, having no son, has succeeded to the property of her deceased husband, cannot make a mortgage or sale which will be valid after her death, of any portion of such property, except when the sale or mortgage is made on account of some necessity, as the providing for her own maintenance, or of some indispensable duty connected with her husband, such as the payment of his debts or acts designed for his spiritual benefit. In the Calcutta Sudder Court a mortgage by a Hindu widow was at one time held to be absolutely invalid, if not proved by the mortgagee to have been incurred for the purposes of her necessary maintenance, or for some indispensable duty (*t*). But the rule thus laid down went too far.

There has been much discussion and some variety of decision on the question of the exact nature of a Hindu widow's estate, and the extent of her powers to deal with it. Latterly, however there has been more uniformity in the decisions of the Courts, and the principles laid down in the case of *Hunoomanpersaud Panday* (*u*), have been applied to Hindu widows, whose power of dealing with the property of their deceased husbands is held in many respects to resemble the power of the manager for a minor to deal with the property of the minor. The rule may be said now to be that one who lends money to a Hindu widow on mortgage of property belonging to her deceased husband's estate, is bound to inquire into the necessity for the loan, and to satisfy himself as well as he can that the widow is acting in the particular instance for the benefit of the estate: if he

(*s*) See the judgment of a Full Bench Court dated April, 29th, 1868, in Sp. Ap. 1898 of 1867. So 1 Agra, F. B. p. 87 : 2 Agra, p. 264.

(*t*) S. D. A. 1849, pp. 64, 405 : 1857, pp. 401, 460.

(*u*) *Supra*, pp. 15, 16.

does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his mortgage: and he is not bound to see to the application of the money. A *bonâ fide* mortgagee will not suffer when he has acted honestly and with due caution, even though he be himself deceived. The current of the later decisions has been to the effect that though a purchaser for value is not bound to prove the antecedent economy or good conduct of the widow who alienates a portion of her husband's estate, or to account for the due appropriation of the purchase money, he is bound to use due diligence in ascertaining that there is some legal necessity for the loan, and may be reasonably expected to prove the circumstances connected with his own particular loan (*v*).

The Supreme Court, in the case of *Goluckmonee Dabee* v. *Degumber Dey* (*w*), said:—"No part of the entire interest when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life estate, but the whole interest is in the widow. When she takes as heir under the Hindu law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore when they term it also a life estate, they mean that expression in a sense different from that of a pure and mere life estate. Such an estate as that last described, may exist as well under the Hindu, as under the English law. It exists when by donation, whether testamentary or *inter vivos*, property is given to one for life. In such a case, there would be no distinction in the nature of the interest, from that of a similar interest created by donation under the English Law. The law upon the point has been settled by the decision of the

(*v*) 1 Hay, p. 257: W. R. 1864, p. 153. 6 W. R. pp. 262, 323. See 8 W. R. p. 519: S. D. A. 1859, pp. 207, 210, 421, 567, 1164: 1860, v. 2, p. 174.

(*w*) 2 Boulnois, p. 193.

Privy Council in the case of *Cossinauth Bysakh* v. *Hurrosoonderee Dossee* (*x*). On the first hearing of that case in this Court, the Court declared by its decree as to the estate of the widow, that she took an interest for her life in the immoveable estate, and an absolute interest in the moveable; on the latter point adopting a distinction between moveable and immoveable estate, which does not prevail in Bengal; and also failing to mark the limitation or the power of disposal as to moveables. The case was re-heard, and the Court by a subsequent decree, rectified its own decree, declaring as to both immoveable and moveable estate, that 'she should be declared entitled to the real and personal estate of her husband, to be possessed, used and enjoyed by her as a widow of a Hindu husband dying without issue, in the manner prescribed by the Hindu law.' It therefore expressly corrected the declaration that she took an interest for life, and declared her entitled in unrestricted terms, limiting the restrictive terms to the possession, use and enjoyment of the property. This decision was affirmed on appeal; since that decision, the decrees of this Court in which it is necessary to declare what interest the Hindu widow takes, have been in conformity to it. It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law, that adverse possession which bars her, bars the heir also after her, which would not be the case if she were a mere tenant for life as known to the English law. Here the lessor of the plaintiff showed that the widow had made an alienation of the estate. Was the Court to assume it an unauthorized alienation? On what principle? We can discover none; there is neither authority nor principle to be found which would warrant the Court in saying, that under all circumstances, and whatever the nature of the suit or the position of the parties, or the rule which regulates the particular action, the presumption must ever be *primâ facie* against the validity of the alienation by a

(*x*) Clarke's Rep., Append. p. 91.

Hindu widow of the estate to which she succeeds as heir. Still less should that presumption be made, where possession has gone along with it for a long time, and a dormant title is asserted against a purchaser for value, after many years. We have looked carefully though the cases cited, and can find none that establishes any such position. In our opinion the law presumes neither against nor in favour of an alienation by a Hindu widow."

In another case (*y*), the Court held that the estate could not be considered as one given by way of maintenance, but as an absolute life interest, so long as it was not used in a manifestly improper manner: and that therefore, a Hindu widow was entitled to save as much as she pleased of the income received by her from her husband's estate, and by her will, or otherwise, to dispose of such savings away from her husband's heirs. And in *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (*z*) the late Chief Justice *Colvile* says: "the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack* which has long given the law to this Court establishes that the estate of the widow is something higher than a life estate: that it entitles her to the possession of the property without restriction: and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible, to define further than by saying that the propriety of any particular exercise of that power must depend on the circumstances under which it is made, and must be consistent with the general principles of the Hindu law regarding such dispositions. The cases of *Oojulmoney Dossee* v. *Sagormoney Dossee*, and *Hurrydoss Dutt* v. *Runjunmonee Dossee* (*m*) which have established in this Court the right of the reversionary heirs, though their interest is only contingent, to maintain a suit to restrain waste by the widow—particularly the latter case in which the late Chief Justice entered at

(*y*) In the goods of *Hurrendernarain Ghose. Koylasnath Ghose*, v. *Bissonath Biswas*, Supreme Court, 30th June 1853.

(*z*) 1 Boulnois, p. 129.

(*m*) 2 Tayl. and B. p. 279.

large into the nature of the widow's estate,—are quite consistent with what I have stated. Sir Lawrence Peel there says 'the estate, though sometimes so expressed to be, is not an estate for life; when a widow alienates, she does so by virtue of her interest, not of a power, and she passes the absolute interest, which she could not do if she had but a life estate.'"

A sale by a widow was in the first instance contested on the ground that the property sold had been specifically devised by the deceased husband for charitable purposes. Failing to establish this point, the plaintiff sought to rely on the absence of proof of a legal necessity. The Madras High Court held that under such circumstances the Court ought to be satisfied with less complete and positive evidence as to the necessity for the sale, than would have been required from the widow, if the plaintiff had in the first instance contested the sale as made without necessity (*a*).

Any alienation of her husband's property is valid if made by the widow with the consent of all (and not merely *the nearest*) heirs of the husband alive at the time of executing the deed by which the alienation is made (*b*). And the consent of the nearest reversioner for the time being has been held to create, as against a subsequent reversioner who eventually inherits, the presumption that the sale was good (*c*). If any reversioner signs the deed as witness, his assent to the act set forth in the deed will be presumed (*d*). But this assent is not in law conclusive so as to preclude further inquiry (*e*).

If a Hindu widow alienates for other than allowable causes, property inherited by her from her husband, her act does not destroy her right, or vest the property in the reversioner. But the reversioner without waiting for her death may sue to obtain a declaration that the

(*a*) 1 Mad. p. 28.

(*b*) S. D. A. 1856, p. 596. See *Jadomoney Dabee* v. *Sarodaprosono Mookerjee*, 1 Boulnois, p. 131. W. R. 1864, p. 148 : 3 W. R. p. 14 : 7 W. R. p. 335.

(*c*) 6 W. R. p. 51.

(*d*) S. D. A. 1856, p. 596. See S. D. A. 1857, p. 271 : 1860, v. 1, p. 625 : 6 W. R. p. 52 : 1 Agra, p. 50.

(*e*) 9 W. R. p. 350.

alienation is not binding except for her life, and also to prevent waste. It has been held (*f*) that a conveyance by a Hindu widow for other than allowable causes, of property which has descended to her from her husband, is not necessarily an act of waste which destroys the widow's estate, and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life. The reversionary heirs are not, after her death, bound by her conveyance: but they are not entitled, during her lifetime, to recover the property either for their own use, or for the use of the widow, or to compel the restoration of it to her. While so deciding, the Court added, "Our decision will not preclude the reversionary heirs, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient case to justify the interference of the Court." In another case (*g*) the Court declared that if waste had been proved, the reversioner would have had a right to sue to restrain the widow from waste, "but his right to do this arises less from the necessity of protecting his own interests than from the function vested by the Hindu law in the next male heir of a person whose estate descends to a female, namely, that of protecting the estate."

If a reversioner suing in the widow's lifetime asks to have his right of inheritance declared, his prayer is premature, because it may be that he will not survive the widow. The reversioner, as being the person entitled to protect the estate, should sue merely for a declaration that the alienation, whether by way of mortgage or otherwise, by the

(*f*) W. R. Sp. p. 166. See 1 Hay p. 339.

(*g*) 2 Hay, p. 608. See 9 W. R. p. 108.

widow has been made without such cause as in Hindu law justified such an alienation, and for a declaration that it will not be binding on the heirs after the death of the widow. What the reversioner is entitled to, is a declaration that upon the death of the widow, the right of inheritance will attach as if she had never made any alienation. The plaint must not pray for immediate possession (*h*).

It would seem that if there were any necessity, such as the Hindu law warranted, for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorised her to raise,—the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise, with interest(*i*). It also appears that if the widow was not authorised to sell any part of the estate because it would have been more beneficial for the reversioners that she should raise the amount by mortgage instead of sale,—the reversioners could not set aside the deed of sale, without placing the purchaser in the same position as that in which he would have been if the widow had mortgaged instead of selling. But it is doubtful whether a purchase can be set aside at all on the ground that it would have been more beneficial for the widow to mortgage than to sell, and whether if a widow elects to sell when it would be more beneficial to mortgage, the sale is not good as against the reversioners, if the widow and the purchaser both acted honestly (*j*).

Where a bond given by a widow for money borrowed by her, contained a recital that the money was borrowed for the purposes of her husband's *shrad*,—it was held that as the recital was no evidence of the fact as against the husband's heirs, it could not entitle a reversioner to sue for a declaration that the money was not borrowed under

(*h*) 9 W. R. p. 108 : 2 W. R. p. 244 : 3 W. R. p. 183 : 5 W. R. p. 131 : 6 W. R. p. 222 : 7 W. R. pp. 119, 303. See 8 W. R. pp. 155, 273 : 1 Agra, p. 240.

(*i*) 9 W. R. p. 108, *per* Peacock, C. J.

(*j*) *Ibid.*

such circumstances as to be binding on the husband's estate or heirs (*k*).

A purchaser from a widow is entitled to possession *during her life* whether the sale by her was allowable or not (*l*).

When a widow made over her husband's estate to her daughter who was the next heir, it was held that this gave the reversioner no present right of action, as his reversionary right was not prejudiced by the widow's act (*m*).

A widow may relinquish her rights in favor of the nearest heir, for the time being, of her husband. Her rights thereupon cease, and the property vests absolutely in the heir in whose favor she relinquishes (*n*).

A suit to set aside an improper alienation, should be brought by those whose interests are directly affected (as the next heirs), not by those whose rights are merely future and inchoate. But a remote reversioner may interfere and sue in a case in which the widow and the transferee and the nearer reversioner are acting fraudulently and in collusion with each other,—there being minors also interested in the property (*o*). And the cause of action in a suit to recover property alienated by a widow arises on her death: during her lifetime the rights of the reversioners are only contingent, and the law of limitation will run only from the date of the widow's death (*p*).

Under the Mitakshara law, if a husband dies solely possessed of property and leaving a childless widow as his heiress, the estate which she takes is similar to that taken under the like circumstances by a widow according to the law of the Bengal school. The power of the widow over property inherited from her husband is limited, and

(*k*) 9 W. R. p. 285.

(*l*) 6 W. R. p. 36: 7 W. R. p. 167: 1 Hay, p. 339. 2 Mad. p. 393.

(*m*) 1 Agra, p. 235. 2 Mad. p. 386.

(*n*) 6 W. R. p. 180: 8 W. R. p. 500. *Jadomoney Dabee* v. *Saroda prosono Mookerjee*, 1 Boulnois, p. 131. See 1 W. R. p. 98.

(*o*) 1 Agra, F. B. p. 57.

(*p*) S. D. A. 1859, pp. 631, 681. 7 W. R. p. 450: 8 W. R. p. 519.

on her death it passes to her husband's heirs (*q*). And there is no distinction in this respect between ancestral and acquired property (*r*).

A decree fairly obtained against the widow, as representing her husband, is binding upon his estate and upon the reversioners. In the case of the *Rajah of Shivagunga* (*s*) their Lordships of the Privy Council said that, assuming the widow to be entitled, as heiress of her husband, to the zemindary in dispute, "the whole estate would for the time be vested in her,—absolutely for some purposes, though in some respects for a qualified interest: and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow. And it is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

When a widow who was not her husband's heiress, sold certain property belonging to the estate, *bonâ fide* for the purpose of paying off debts which had been contracted by the deceased, and the heirs came forward and caused the sales which she had made to be set aside, it was held that the purchaser, the sale to whom had been declared void, might claim, as against the heirs, to stand in the position of one who advanced his money to the widow for proper purposes, or at any rate that he might be considered entitled to have those charges which his monies had satisfied revived against the inheritance. The heirs were declared liable for the amount of the purchase money to the extent of the assets of the deceased received by them (*t*).

(*q*) 3 W. R. p. 105: 8 W. R. p. 519. *Keerut Sing*, v. *Koolahul Sing*, 3 Moore's Ind. Ap. p. 331: *Must. Thakoor Deyhee*, v. *Rai Baluk Ram*, 2 Ind. Jur. p. 106: *Bhugwandeen Doobey* v. *Myna Baee*, 9 W. R. p. 23 (P. C.)

(*r*) *Must. Thakoor Deyhee*, v. *Rai Baluk Ram*, 2 Ind. Jur. p. 106.

(*s*) 2 W. R. p. 31 (P. C.), 9 Moore's Ind. Ap. p. 539.

(*t*) 1 Agra, p. 291.

One who, without inquiry, purchases or takes a mortgage from a Hindu wife, whose husband is alive, is in no sense a *bonâ fide* purchaser or mortgagee without notice of the husband's rights (*u*). But if a husband allows his wife to appear as the owner of an estate, and if, the wife having mortgaged it, the husband subsequently ratifies her act, neither the husband nor an execution creditor of his can set aside the mortgage on the ground that the wife was not the owner (*v*).

The creditor of a deceased Hindu does not obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's lifetime. When the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands, for the satisfaction of his debt. If he allows the heirs to dispose of the estate to a *bonâ fide* purchaser, he cannot follow it in the hands of the purchaser, but has only a right to bring a suit against the heirs personally, who are responsible to him to the extent of the assets they receive (*w*). This was so decided in a case in which the contention was that the creditor, though his debt was not secured by any mortgage or hypothecation, had on the death of the debtor such an interest in, or charge upon his estate, that the heirs could not sell it even to a *bonâ fide* purchaser, so as to confer upon him a clear title. It was argued that the purchaser took the property subject to the claim of the creditor.

A Mahomedan widow cannot legally alienate property devolving upon her as dower, without the consent of the other heirs of her husband: and a mortgage made by her without such consent may be set aside by them (*x*).

A mortgage of land devoted to religious purposes, whether by Hindus or Mahomedans, is invalid; as also is a mortgage of the produce of such lands (*y*). But the

(*u*) 6 W. R. p. 312.

(*v*) 8 W. R. p. 67.

(*w*) 1 Agra F. B. p. 72. So 2 W. R. p. 296.

(*x*) N. W. P. v. 8, p. 45. See 1 Agra, pp. 151, 288.

(*y*) N. W. P. v. 7, p. 118; 7 Sel. Rep. p. 268. See S. D. A. 1849, p. 65: 1855, p. 323: 1858, p. 586; W. R. 1864, p. 157.

Agra Sudder Court held that it does not necessarily follow that because lands are wuqf, the temporary alienation of them by the mutawallee is illegal:—and that the mutawallee is in fact entitled to dispose of such portion of the property as may be required in order to raise money for necessary repairs, the preservation of buildings in all cases of endowment being a matter of indispensable necessity (*y*).

Probably the principle which ought to rule all such cases is that those alienations, and those alienations only, which fall within the scope and spirit of the endowment, are to be supported (*z*).

When there is a decree against a *Shebait*, as such, for the payment of money, the endowed property cannot be sold: it has been held, however, that the rents and profits may be attached to pay the judgment debt (*a*).

If the Court finds that the endowment is merely nominal, and not *bonâ fide*, the property will be dealt with in the ordinary mode, and will not be treated as property set apart for religious purposes (*b*).

It was held by the Agra Sudder Court that though a mortgage by the mohunt of a Hindu temple, of land belonging to the temple, might be bad, the faqueers attached to the temple could not sue for the cancelling of the deed of mortgage, and erasure of the name of the mortgagee from the books of the Collector: and that their remedy, if they had any, was by proceedings to be taken by them before the Revenue Authorities, under Regulation XIX of 1810 (*c*). That Regulation has, however, been repealed by Act XX of 1863: and probably the remedy of the faqueers now would be by proceedings taken in the Civil Court against the mohunt, under sections 14 and 15 of this Act.

(*y*) N. W. P. v. 8, p. 433. See Macnaghten's Mahomedan Law, p. 328.

(*z*) See 5 W. R. p. 158.

(*a*) 5 W. R. p. 202. See 5 W. R. p. 176.

(*b*) 3 W. R. p. 142.

(*c*) N. W. P. v. 7, p. 118.

In the case of a mortgage by conditional sale, the right of pre-emption does not arise until the sale is made absolute (*d*).

A suit for pre-emption may be brought as soon as the sale becomes absolute on foreclosure, even although the mortgagee has not taken possession (*e*). And it has been held that a claim to the right of pre-emption should be made immediately on the sale becoming absolute (*f*). In another case, however, the Court decided that a suit brought by one who claims the right of pre-emption, is not barred by lapse of time if brought within one year from the date of the mortgagee's actually getting possession (*g*).

(*d*) 2 W. R. p. 215 (a Full Bench decision). See also 5 W. R. p. 76.

(*e*) W. R. 1864, p. 285.

(*f*) 6 W. R. p. 117.

(*g*) 2 W. R. p. 5.

CHAPTER IV.

OF MORTGAGE CONTRACTS.

PARTIES may enter into a contract of mortgage in the same manner as they may make any other contract,—that is to say, their agreement may be either verbal, or in writing. Proof of the existence of the contract is all that is necessary, and if satisfactorily established, a verbal agreement will have as full an effect as a written one (*h*).

At the same time, verbal contracts are so open to misconstruction and fraud, and there is so much difficulty in proving them after a long lapse of time, that they are to be especially distrusted in the case of mortgages of land, where disputes seldom arise until some considerable period has passed. Moreover, all instruments duly registered under the Registration Act, and relating to immoveable property, take effect against any oral agreement relating to the same property (*i*). Consequently mortgages by merely verbal agreements, are seldom or never met with in practice.

As the possession of property without the means of showing the right to such possession, is of comparatively little value, and the mere holding of those means by another gives him a certain power over the land and those to whom it belongs, a deposit of title deeds as security for a debt due, puts the creditor in a position to prevent the

(*h*) 4 Sel. Rep. p. 168. See also 2 Sel. Rep. p. 74, and N. W. P. v. 4, p. 219 : and *post* p. 38.

(*i*) Act XX of 1866, sec. 48.

effective transfer of the estate without his debt being discharged. A deposit of this nature, in English law known as an "equitable mortgage," is treated as a valid simple mortgage of the whole property to which the deeds deposited refer, and is subject to the same rules as a regular mortgage (*j*). Such a security is evidently much more safe than a mere agreement unaccompanied by any deposit (*k*). But much risk and confusion are avoided, by having in all cases a short and accurate deed, attested by at least two credible witnesses, and duly registered, which may itself testify to the real facts of the case and the intentions of the parties contracting.

A mortgage deed should set forth shortly but distinctly, all the material points of the agreement into which the parties really intend to enter (*l*). It should state with strict accuracy, the consideration given, the locality and description of the property pledged, the nature of the mortgage, the length of time it is to remain in force, and any other conditions which the parties may have agreed upon, together with the date of the execution of the deed.

The stipulations as to the payment of interest should be accurate and clear. In a case where the mortgagee had not the usufruct of the property, the mortgage deed was silent on the subject of interest. The Court on account of this silence refused to allow any interest from the date of the deed up to the time when the money lent became re-payable (*m*).

(*j*) 6 Sel. Rep. p. 165. See the judgment of the Privy Council in *Varden Seth Sam* v. *Luckpathy Royjee Lallah*, Marsh. p. 461, 9 Moore's Ind. Ap. p. 303. See also Reg. X of 1829, Schedule A. Art. 35 (now repealed), and Act X. of 1862 Schedule A. Art. 46,—where any contract accompanied with the deposit of title deeds, when the same may be made as a security for money due or lent at the time, is declared liable to the same stamp duty as an ordinary mortgage deed.

(*k*) N. W. P. v. 7, p. 450.

(*l*) See N. W. P. v. 9, p. 455. For precedents of mortgage deeds of different kinds, and also of a common English mortgage deed, see Appendix.

(*m*) S. D. A. 1855, p. 54. See also 1854, pp. 514, 518 : 1 Agra F. B. p. 63 (68).

In one case, a mortgage deed was executed in the ordinary form. Two days afterwards the mortgagees executed an ikrarnama in which they undertook to pay Rupees 110 to the mortgagor as subsistence money. The latter instrument did not mention, and was not mentioned in, the former. The mortgagees subsequently transferred their rights under the first deed to third parties. It was held that these assignees were not liable to pay the subsistence money. "There is nothing whatever to connect the subsequent engagement with the mortgage deed, nor can any privity of contract between the mortgagor and the parties to whom the mortgage was afterwards transferred by deed, be inferred from the evidence or circumstances of the case" (*n*).

If more deeds than one are requisite in order to carry out the views of the parties, but all of them forming part of the mortgage contract, each of them should contain a reference to the others, so that it may appear on the face of them that they all are but one transaction and must be taken in connection with each other. Thus in making a mortgage by conditional sale, it is a common custom to make an absolute sale of the property, and at the same time to execute an ikrarnama declaring the sale to be only conditional and made in fact by way of mortgage (*o*). A reference in each of these deeds to the existence and purport of the other, will be preventive of fraud and a protection to all parties (*p*).

If the ikrarnama is substantially part of the original arrangement, the fact that it is dated two days after the principal deed which purports to be one of absolute conveyance, does not prevent the transaction being one of mortgage only (*q*).

It used to be held that the terms of a written deed

(*n*) N. W. P. v. 11, p. 6.

(*o*) See an instance S. D. A. 1859, p. 127.

(*p*) N. W. P. v. 8, p. 564 : v. 10, p. 223 : 4 Sel, Rep. p. 174.

(*q*) 2 Hay, p. 256, W. R. Sp. p. 79.

might be varied or modified by a verbal agreement, and that a deed which on the face of it was one of absolute sale, might by a verbal agreement be converted into one of mortgage (*r*). Strict proof of any such verbal agreement was required, and the *onus* of proving that the actual engagements between the parties differed from those written, lay on the party who alleged that such difference existed (*s*).

But it has been held more recently—the decision is that a Full Bench,—that parol evidence is not admissible to vary or alter a written contract, in cases where there is no fraud or mistake, and in which the parties intend to express in writing that which their words import. If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he sells absolutely, he cannot by mere verbal evidence show that at the time of the agreement both parties intended that their contract should not be such as their written words express. Therefore where there is a written bill of sale, absolute on the face of it, a contemporaneous verbal agreement that the transaction shall be one of mortgage only, is not admissible in evidence (*t*).

A prior written contract may be varied by a subsequent verbal one, in cases in which the law does not require the contract to be in writing (*u*). And parol evidence is admissible to explain the acts of the parties. Therefore when the defendant, who alleged the transaction to be one of mortgage only, alleged that the plaintiff never had had possession under his bill of sale (which on the face of it was an *absolute* sale) *Peacock*, C. J. was of opinion that if possession did not accompany or follow the absolute

(*r*) S. D. A. 1858, p. 741. See S. D. A. 1859, p. 362: 1861, v. 1, p. 189: 1 Hay, p. 325.

(*s*) N. W. P. v. 8, p. 473.

(*t*) 5 W. R. pp. 68, 76. (Full Bench decisions). See also 6 W. R. p. 111: 2 Agra, p. 163: and 6 W. R. p. 267 and 7 W. R. p. 334,—which last two cases are opposed to each other.

(*u*) 5 W. R. p. 68.

bill of sale, it would be a strong fact to show that the transaction was a mortgage and not a sale, and that it was necessary to try whether the plaintiff was ever in possession, and whether, having reference to the amount of the alleged purchase money paid, and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed as an absolute sale or to treat the transaction as a mortgage only (*v*). And in another case the Court said that the decision of the Full Bench just referred to "did not decide that Courts of Justice must invariably consider a deed drawn as such to be one of out-and-out sale, and not take into consideration the acts and conduct of the parties in their own view and dealings in regard to the transaction,"—and that if the vendee were proved to have himself treated the transaction as one of conditional sale, the Court would not hold it to be one of absolute sale (*w*).

But though evidence of the acts and conduct of the parties is admissible in cases in which third parties are not concerned, the rights of a third party acting *bonâ fide* upon the faith of an absolute sale (for instance the rights of a *bonâ fide* purchaser for value from the apparent vendee) are not affected by those acts and conduct (*x*).

Verbal evidence is admissible to show that a party to a deed was a party only *benamee* for another (*y*).

When the deed of sale stated that the purchase money "was paid and it was necessary to give possession to the purchaser,"—but possession was not given, and the seller remained quietly in possession for two years, it was held that the sale had never been completed, and that it was open to the plaintiff to show that this was so, and that the money was not paid (*z*).

Contracts are to be dealt with and deeds construed according to the real intention of the contracting parties dis-

(*v*) 5 W. R. p. 71.
(*w*) 5 W. R. p. 104. See 8 W. R. p. 152.
(*x*) 5 W. R. p. 72.
(*y*) 6 W. R. p. 191.
(*z*) 7 W. R. p 408. See 8 W. R. p. 339.

closed by the transaction (*a*). It is therefore not necessary that a mortgage should be called a mortgage by name, or that the class to which it belongs should be expressly stated. An agreement that "until the amount of the bond shall be paid, the debtor will not transfer certain property by sale, mortgage, or gift," has been held to be a simple mortgage of the property mentioned. So, a money bond containing a stipulation that until the money was re-paid, the debtor would not alienate his rights as zemindar in any other quarter, was held to be a bond in the nature of a simple mortgage (*b*).

And so long as the nature of a transaction is materially such as to stamp it as belonging to a particular class of mortgage, the mere calling it by a different name will not transfer it to another class. In one case, where there was an absolute sale, but the purchaser gave an ikrarnama with a condition that if the vendor re-paid the purchase money and interest by a fixed day, the purchaser would reconvey the estate to him, it was contended that this was a redeemable sale only, and not a mortgage by conditional sale, nor governed by the rules applicable to such mortgages. But the Court held, that "redeemable sales," and "mortgages by conditional sale," were in their nature identical, and merely different modes of expressing the same thing, and that therefore a redeemable sale could be foreclosed only in the same manner as a mortgage by conditional sale (*c*).

So, zur-i-peshgee leases are treated in all respects as usufructuary mortgages (*d*), when they contain a proviso either express or manifestly implied, for redemption. But when the mortgage is by way of lease, it is desirable that

(*a*) See the case of *Hunooman-persaud Panday*, 6 Moore's Ind. Ap. p. 393.

(*b*) N. W. P. v. 7, p. 124: v. 8, p. 669: 7 W. R. p. 309: 2 Agra, p. 124.

(*c*) N. W. P. v. 8, p. 564. See 4, Sel. Rep. p. 174.

(*d*) *Supra*, Chap. II. See S. D. A. 1857, p. 1232: 1859, p. 977: 2 Hay, p. 159: 6 W. R. p. 6.

the deed should declare expressly that the lease is in fact given as a mortgage security: and there should be a condition that if the advance is not re-paid when the lease expires, the mortgagee shall be entitled to hold on, until his claim is satisfied. In a case where there was no such condition, but on the contrary it was stipulated that if at the expiration of the term for which the lease was granted, the lessor failed to pay down at one time the whole amount of the advance made, the lessee should be at liberty to take such steps as might be deemed proper to recover the amount from the lessor, it was held that the absence of a proviso that the lease should continue until re-payment, more especially when the deed contained a condition that the amount might be recovered from the mortgagor, distinguished and removed the case from the ordinary category of leases held to be usufructuary mortgages (*e*). So the simple advance of 500 Rupees in consideration of receiving a lease for twelve years was held not to be a mortgage transaction, in the absence of any appearance of intention that it should be taken as such (*f*). In another case a lease for twenty years was granted, by the terms of which it was provided that on the expiry of the twenty years the land should be made over to the lessor: and that the lessee alone should benefit by any improvement of the property or increase in the rents, but that he alone should bear any loss of rents or decrease in their amount. The Court said (*g*): "The deed before us is in fact an absolute sale of a lease for a fixed period, to which the rules common to mortgage transactions cannot be applied, as the extinction of the original debt is not solely dependent on the receipt of adequate profits, but on profits *whatever they may be* during the continuance of the lease. Should they fail, the debt is neither realisable from, nor secured by, any other resources: this is no

(*e*) N. W. P. v. 8, p. 356.
(*f*) S. D. A. 1855, p. 481.
(*g*) S. D. A. 1857, p. 1232.

device, but a substantial risk entitling the lender to any benefit from the bargain."

Lands were conditionally purchased by A, who paid down a certain sum of money and agreed to pay a further sum seven years afterwards: upon making the latter payment, A was to be put in possession, and the borrowers were within ten years from that date to pay off the whole loan and redeem their lands. A never advanced more than the first sum, and he never got possession. It was held that the transaction did not amount to a mortgage, and that the money which A advanced was a simple debt for which there was no lien on the lands (*h*).

For a certain fraudulent purpose, the parties to an out-and-out sale represented that it was not a sale but a mortgage. Subsequently the parties voluntarily restored the transaction to its original state,—that of an absolute sale: at a still subsequent period the vendor sued to redeem, treating the matter as a mortgage. It was held that the suit could not lie, and that as between the parties the transaction was a sale and not a mortgage (*i*).

From badly drawn instruments it is often difficult to discover what the exact nature of the transaction has been. This obscurity ought to be avoided, as the whole position of the parties depends upon the class to which the mortgage belongs (*j*): and when a deed is so loosely worded as to admit of more than one interpretation, the Courts will always construe it in the sense most favourable to the mortgagor (*k*). Where the construction to be put upon the contract is doubtful, the conduct of the parties during many years may be looked to as shewing in what manner they understood the terms of the agreement (*l*).

In mortgages of an usufructuary nature, it should be stated clearly whether the profits are to be taken in lieu of interest only, or whether both principal and interest

(*h*) S. D. A. 1858, p. 1491.
(*i*) 6 W. R. p. 293.
(*j*) N. W. P. v. 8, pp. 356, 370, 447.
(*k*) N. W. P. v. 5, p. 113.
(*l*) 2 Agra, p. 150.

are to be recovered from them, because in the latter case the pledger is not personally liable (except under particular circumstances), and the mortgagee must look to the land alone for payment of his debt and the interest thereon (*m*). The personal liability of the mortgagor in a usufructuary mortgage depends wholly on the terms of the contract (*n*). If the intention was to charge the land with the interest alone, the mortgagee has only the personal security of the mortgagor for the principal (*o*).

A plaintiff objected to the allowance of interest at a rate in excess of the usufruct, and the Court held the objection to be good, saying: "when it is manifest that the usufruct does not amount to simple interest at a legal rate, and there is no rate of interest stipulated for, the presumption is that the usufruct was deemed by the mortgagee sufficient interest for his money debt, and that the mortgagor is not bound to pay a further sum to make up any particular rate; the law is satisfied if no more than legal interest is received, and the Court has nothing to do with the accounts if less than that amount has been taken. In the present case as no rate of interest was stipulated for, and the usufruct does not exceed a legal rate, the mortgagee must be considered as having agreed to take that and rest satisfied with the security the land afforded for regular payment. We therefore modify the judge's decree, by declaring plaintiff entitled to recover possession when able to pay up the amount of the principal of his debt, defendant retaining the land as security for interest till such debt is paid" (*p*).

The parties may make any conditions or covenants they please, so long as these are not in themselves illegal (*q*), as,—that the mortgagee in possession shall pay the mortgagor a certain allowance or rent (*r*): that the loan shall be

(*m*) N. W. P. v. 3, p. 211: 1 Sel. Rep. p. 121. See S. D. A. 1857. p. 1232.
(*n*) 6 W. R. p. 283.
(*o*) Marsh. p. 209.
(*p*) S. D. A. 1860, v. 2. p. 223.
(*q*) N. W. P. v. 7, p. 307.
(*r*) S. D. A. 1852, p. 577.

repaid by instalments, and that in default of payment of any one instalment, the mortgagee shall be entitled to foreclose for the balance then due (*s*) : that no payment made by the debtor shall be allowed, unless it is duly endorsed on the deed (although the Courts will notwithstanding such a condition, admit proof of payment of a sum not so endorsed) (*t*) : that after payment of Government revenue and village expenses, the mortgagor shall pay to the mortgagee the entire surplus collections, and also all that may be derived from alluvion, and that if in the month of Jeyt in any year the whole surplus is not paid to the mortgagee, he shall be entitled to enter into possession (*u*) : that if any ground shall be lost from the encroachment of a river bordering on the estate, the mortgagor shall make good the loss, and if any thing is gained from the same river, the mortgagee shall make an allowance for it (*v*) : that a third party named, as well as the mortgagor, shall have the right of redeeming (*w*) : that the mortgagor shall make good the balances of rent unpaid by cultivators (*x*) : that the mortgagor shall not alienate or mortgage his interest until the debt is paid off with interest (*y*) : that the mortgagor, not retaining possession, shall pay the Government revenue,—and any other similar covenants.

The property intended to be mortgaged should be described, so that it may be readily recognised and identified. When the villages or other places named are well defined, their names will suffice : in other cases the boundaries should be given.

It seems that words used in a future sense, such as " and whatever property I may hereafter acquire," or words which are general and do not refer to any specific property, will not give any lien to the mortgagee, as against an inter-

(*s*) N. W. P. v. 7, p. 322.
(*t*) S. D. A. 1853, p. 544. 8 W. R. p. 316.
(*u*) N. W. P. v. 8, p. 70.
(*v*) S. D. A. 1852, p. 928.
(*w*) N. W. P. v. 3, p. 187.
(*x*) N. W. P. v. 7, p. 482 : v. 8, p. 70.
(*y*) N. W. P. v. 6, p. 39 ; v. 7, p. 614 : *et passim.*

mediate *bonâ fide* purchaser. Where there was a mortgage of certain villages named, and in the concluding part of the deed, authority was given to the mortgagee, on default of payment by the mortgagor, to sell the villages pledged, as well as "any other existing property and whatever may hereafter be acquired," a village acquired by the mortgagor after the execution of the deed, was held not to be included in the mortgage, so as to defeat the claim of a purchaser at public auction in execution of a decree. The Court said that independently of the fact that the mortgagor was not possessed of the village at the date of the deed, the words were to be treated as mere surplusage, because without them all his property was equally liable to make good the mortgagee's claim should the pledged estate prove insufficient (*z*). In another case it was decided, that an agreement by a debtor to discharge a debt by instalments and "not to alienate any part of his property,"—the property not being specified,—"until the debt had been paid," did not operate as a mortgage, or vitiate the title of a *bonâ fide* purchaser from the debtor. But it was declared to be doubtful whether, after the debtor has committed a breach of his agreement, "the creditor is any longer bound to act on the forbearance stipulated for by the *kistbundee*, and may not *at once* demand payment in full of the debt due to him" (*a*).

According to a decision of the Calcutta Sudder Court, all conditions are null and void which are to the effect that the mortgagee shall, on default being made by the mortgagor, have power to sell the mortgaged property and so repay himself, without applying to the Court or acting under its directions. A mortgage deed gave the mortgagee a power of sale over the estate, in case default should be made in payment of the mortgage money on a day named: the mortgagee sold under the power: and the purchaser brought a suit against the mortgagor to

(*z*) N. W. P. v. 7, p. 265. (*a*) S. D. A. 1855, p. 353.

obtain possession of the land sold to him. The Court refused to recognise the validity of such a power, or to give any assistance in carrying it into effect, saying (*b*). "Such a condition might be perfectly consistent with the laws of a great commercial country affording every facility to the capitalist lender, but, at the same time, be quite inconsistent with the laws of a country deriving the great bulk of its revenue from the land, and as a recompense for the stringency of the rules under which it is compelled to collect its revenue in order to carry on the Government, (sale of the estate being the penalty of default,) affording every possible protection, in his private transactions, to the land-holding borrower. The Regulations will be searched in vain, for any express enactment prohibiting the sale of a mortgaged estate under a power of sale. But such a power is repugnant to the principles of the Regulations enacted by Government for regulating the transfer of immoveable property in satisfaction of debt in general, and in satisfaction of debts on mortgage in particular. The regulations do not sanction, in any case, the transfer of immoveable property in satisfaction of a debt, without the intervention of a public officer, except such transfer be by the direct and immediate act of the proprietor himself."

Such a power is therefore of no effect, as the law at present stands (*c*). But it may be doubted whether the dread of injustice to the mortgagor, which led the judges to the opinion which they formed, is sufficient to outweigh the manifest convenience and advantage to both parties, which arise from a sale unaccompanied by the expense and delay by which litigation is at all times attended. Moreover, except where there are strong reasons for it, interference with arrangements fairly made between individuals is much to be deprecated. There

(*b*) S. D. A. 1847, p. 354.

(*c*) See *Doucett* v. *Wise* 2 Ind. Jur. p. 280 (292). The question was raised in that case, but not expressly decided by the Court.

is nothing *primâ facie* inequitable in such a power, and if in fact any great oppression is worked by the mortgagee, or the land is sold for a manifestly unfair price, the mortgagor still has his remedy through the Courts.

In England also, it was once doubted whether such powers should be upheld and encouraged, and for a time the inclination and the decisions of the Courts were against them. But for a very long period, they have been uniformly supported and enforced. A power of sale on default is given to the mortgagee in almost every English mortgage deed: and it is constantly acted upon, without any general complaint being heard of the evil effects produced thereby. On the contrary, such powers are found in practice to be very useful, and to be the means of avoiding much expense and delay: while in the event of any abuse of the privilege they confer, the mortgagor has no difficulty in obtaining relief from the Courts. The observations of a well-known writer on the subject of English mortgages, are very much to the point (*d*): "Doubts were formerly entertained of the validity of an exercise of these powers of sale, without the concurrence of the mortgagor, or the sanction of a Court of equity, but they were groundless: a slight consideration will shew that they are not within any of the mischiefs intended to be guarded against by the Courts of equity, for they give nothing to the creditor beyond his principal, interest, and costs: they bestow on him no collateral or ulterior advantage; and they only enable him with promptitude to obtain payment of his mortgage debt."

Since the passing of Act XXVIII of 1855, interest may be contracted for at any rate on which the parties choose to agree. But no agreement to pay interest at a rate higher than 12 per cent. per annum can be enforced if it was entered into prior to the passing of that Act.

By Section 8, Regulation XV of 1793 (*e*), it is enacted,

(*d*) Coote, p. 124.

(*e*) See Reg. XXXIV. 1803, Secs. 7 and 8: Reg. XVII. 1806, Sec. 2.

that "the Courts are not to decree any interest whatever, in any case where the bond or instrument given for the security and evidence of the debt, shall have been granted on or subsequent to the 28th of March 1780, and shall specify a higher rate of interest than is authorized by this Regulation to have been given and received subsequent to that date;" and by Section 9 of the same Regulation, "nor to decree any interest whatsoever in favor of the plaintiff, in any case when the cause of action shall have arisen on or subsequent to the 28th of March 1780, when a greater interest than is authorized by this Regulation shall have been received or stipulated to be received, if it be proved that any attempt has been made to elude the rules prescribed in it, by any deduction from the loan, or by any device or means whatever, nor to give any other judgment but for dismission of the suit, with costs to be paid by the plaintiff." So that under the old law, conditions by which it has been attempted to secure more than the principal sum advanced with interest at the rate of 12 per cent. per annum, are void, not only as to the interest stipulated for in excess of that which the law allows, but as to the legal interest also: and should the attempt to secure interest at an illegal rate, have been made in such a manner as to be considered by the Court to be "elusive" of the law, a suit brought on the contract will be dismissed with costs, and neither the principal nor the interest will be recovered.

In a case of bye-bil-wufa, the mortgagee having exacted illegal interest by deduction from the principal, his suit to have the sale made absolute was dismissed with costs, as the transaction was considered to be a device within the meaning of Section 9 of the law against usury (*f*).

There was a regular mortgage by conditional sale on an actual advance, and at the same time, the mortgagor transferred absolutely to the mortgagee certain other land, without any consideration, but under pretence of the

(*f*) 5 Sel. Rep. pp. 8, 79.

transfer being in payment of charges for drawing conveyances, &c. This was held to be "elusive" of the usury law, and the suit of the mortgagee to render the conditional sale absolute, was dismissed with costs (*g*).

A deed in which sums which had not then been paid, were admitted to have been received, and an engagement was entered into to pay interest on them from the date of the deed, that is, for a time before payment of them, was held to be usurious and "elusive," and a suit founded on it was dismissed with costs (*h*).

And a transaction is equally liable to be set aside whether it consists of one, or of several separate agreements, and even though the deed on which the suit is brought is, when taken by itself, perfectly free from any appearance of usury.

In a suit to obtain possession of certain premises, under a deed of bye-bil-wufa, where the mortgage had been foreclosed and the sale had become absolute,—it appearing that 12 per cent. per annum was the rate of interest stipulated in the deed to be paid, and that the mortgagor had granted a separate bond in which he undertook to pay one per cent. additional,—the transaction was held to be evasive of the law, and the suit was dismissed with costs. Here the mortgage deed, which was in itself unexceptionable, was the agreement on which alone the mortgagee's suit was founded: but it was vitiated by the existence of the other instrument (*i*).

A *theeka* lease of land was granted, ostensibly to the agent of a banker, who had just advanced a sum of money to the lessor; the banker at the same time got a mortgage of the same property, and an assignment of the *theeka* rent, which of itself more than covered the stipulated interest on the loan,—8 per cent. After paying the Government revenue and deducting the interest at 8 per cent., there remained such surplus receipts as gave the

(*g*) 5 Sel. Rep. p. 346.
(*h*) S. D. A. 1852, p. 516. See S. D. A. 1853, p. 268.
(*i*) 4 Sel. Rep. p. 10.

mortgagee, in the whole, interest at about 14 per cent. In the lease it was stipulated that no account of profits should be asked for by the lessor and mortgagor. The mortgagor sued to recover possession, alleging that the deeds were elusive of the usury laws, and that the principal with the stipulated interest at 8 per cent. had been liquidated from the usufruct. The Court held that the two deeds were to be considered as one transaction, in the light of a simple usufructuary mortgage so contrived as to elude the usury laws. But, "as the mortgagor had not come into Court to ask that the principal should be declared forfeited in consequence of infraction of the law of usury," he obtained his decree for possession, only on shewing that the principal sum with the stipulated interest had been realised from the usufruct (*j*).

By a contract (denominated *soudaputtro*) the defendant bound himself in consideration of an advance of rupees 21 made to him on the 15th Sawun 1256, to supply to the plaintiffs 21 maunds of *tethoor* or hooley powder, in the following Pous, or in default thereof to pay the plaintiffs the value of the above quantity at the current selling price of the article in Phalgoon. The defendant having failed to deliver the powder stipulated for, an action was brought for rupees 42, being the price of 21 maunds, at the rate at which hooley powder was selling in Phalgoon. The Court in delivering judgment said,—"There is, in our opinion, nothing illegal in the stipulation of this contract, which is clearly a contract to supply a certain article of trade at a particular time, to enable the plaintiffs to take advantage apparently of an expected rise in the price at a particular season. This cannot be construed into an attempt to evade the provisions of Section 9, Regulation XV of 1793."(*k*) This decision was followed in some subsequent cases (*l*).

(*j*) S. D. A. 1842, p. 678. See N. W. P. v. 8, p. 411.

(*k*) S. D. A. 1857, p. 118.

(*l*) S. D. A. 1857, pp. 183, 189: 1858, pp. 457, 913, 961. See *contra* S. D. A. 1855, p. 452.

In one of these cases (*m*) the Court said that it would not be a fair interpretation of Section 9 of Regulation XV. 1793, to bring within its terms every contract, the ultimate effect of which was to secure to the lender more than the legal interest of 12 per cent. upon money lent by him. "A contract, it appears to us, is without the terms of that law, whatever its ultimate effect may be, provided it be on the face of it a fair and open transaction, and one in which the borrower takes the chances of the market price of an article at a particular period, when covenanting regarding the mode in which his debts may eventually be repaid."

If the condition on which a mortgage by conditional sale is declared to be redeemable is such that, if carried into effect, the mortgagee would receive more than the principal and legal interest, this may be considered an evasion of the usury law.

Lands were sold on payment of rupees 4,401, the vendee covenanting by a separate deed not to take possession until the lapse of a year and four months, at the end of which time the vendor might re-purchase on paying rupees 5,801, otherwise the sale to be absolute. The vendor did not re-purchase, and the lender sued for possession as on an absolute purchase. But the transaction was held to be a bye-bil-wufa with a stipulation for the payment of illegal interest, and to be evasive of the regulations against usury. Under the special circumstances of the case, however, the principal was not declared forfeited, but only the interest (*n*).

Forfeiture of principal as well as interest could be enforced, only where the contract was so covert as to be manifestly a device, implying disguise and trickery. Unexceptionable proof of a design to evade the law was required, before the penalty of dismissal with costs could be imposed (*o*).

(*m*) S. D. A. 1857, p. 183.
(*n*) 2 Sel. Rep. p. 146.
(*o*) N. W. P. v. 10, p. 43. 5 Sel. Rep. p. 10: S. D. A. 1847, p. 459: 1852, p. 1132: 1853, p. 893: 1855, p. 336: 1857, p. 849: N. W. P. v. 10, p. 276.

In a case, where the bond contained a stipulation for only legal interest, but the defendant set up a case of usury, attempting to prove a verbal agreement by which he was to pay 12 per cent. additional, the Court declared that if this verbal agreement had been proved, it would not have brought the bond within the terms of the usury law so as to cause the forfeiture of the bond. "Such a verbal agreement could not admit of being enforced, and if the illegal interest so stipulated were paid, it could only be at the option of the borrower. The inutility of such a stipulation, renders it extremely improbable" (*p*). In making this remark, however, the Court seems to have forgotten that under the old law it mattered not how fully the parties might at the time of contracting have given their consent, or with what solemnities the contract might have been entered into,—in no case whatever, could the payment of illegal interest be enforced: and if illegal interest was ever paid, it was so "only at the option of the borrower."

In another case, it was said that had the deed on which the suit was brought not been registered, Section 9, Regulation XV of 1793, would have been applicable:—but that as it had been registered, Section 8 would apply, and the interest only be declared forfeited (*q*). This, however, is not a satisfactory decision: for the authenticity and legality of a registered deed must be established in just the same way as that of an unregistered one which has never left the hands of the parties (*r*).

It will be seen from these decisions that it frequently was not easy to say whether a case came under the more, or under the less stringent section of the old usury laws. We can only gather, that the greater the pains taken to conceal the existence of an agreement for usurious interest, the greater was the risk of loss to the lender. What benefit can ever have arisen from drawing a distinction be-

(*p*) S. D. A. 1853, p. 259. See S. D. A. 1858, p. 643.

(*q*) 2 Sel. Rep. p. 146.

(*r*) S. D. A. 1853, p. 245: N. W. P. v. 6, p. 266. See next Chapter.

tween cases "elusive," and those not so, it is difficult to conceive: for to say that a man who openly stipulates for illegal interest shall run the risk of losing only that interest, while the man who makes the same agreement covertly shall risk not only the interest but the principal, seems, without affording any substantial protection to the borrower, merely to give encouragement to the more open infraction of the law.

If in drawing up a bond payable by instalments, the interest accruing during the currency of the bond was provided for by adding a certain sum to the original debt, and taking a bond for the whole sum, this was not an infraction of the usury laws, so long as the additional sum stipulated for as interest, did not exceed the limit prescribed by law (*s*).

A mortgagee, who was a Mahomedan and wished to avoid the appearance of taking interest, actually advanced only rupees 1,300, but consolidating the legal interest of that sum for five years (rupees 781), the period during which the mortgage was made redeemable, took a mortgage bond for the aggregate sum of rupees 2,081;—it was held, that he was entitled to recover the sum actually advanced, with interest at the rate of 12 per cent. per annum, as there was no attempt or intention in fact to get more than legal interest (*t*).

In an agreement mortgaging land the rents of which amounted to about rupees 2,500, it was stipulated that out of these rents, the mortgagee should pay himself interest at 10 per cent. with 10 per cent. as expenses of collection, and should discharge certain public burdens, devoting the surplus to the reduction of the principal,—and that if the rents fell short of rupees 2,500 a year, the mortgagors should make them up to that sum. This was held to be a good agreement, and not usurious; and the

(*s*) N. W. P. v. 9, p. 487.
(*t*) 2 Sel. Rep. p. 255. See S. D. A. 1852, p. 577.

rents falling short of rupees 2,500 a year, the mortgagee recovered the deficiency from the mortgagor (*u*).

In one case, where there was a condition in a mortgage deed (the mortgage being of an usufructuary nature), that the mortgagor should not demand a settlement of mesne profits when redeeming, the Court expressed an opinion that such a condition had a tendency to evade the laws against usury, but held that such a stipulation was to be disregarded, and that the general rule as to the redemption of mortgages of the nature of the one in suit, should be acted upon (*v*).

So in like manner, a condition that the mortgagor shall have no right to claim an account of the proceeds of the estate during the occupancy of the mortgagee, cannot, (and no similar special condition between the parties can) bar the operation of the law by which the lender "is to account to the borrower for the proceeds during his possession." It appears to have been the opinion of one judge, that if the point were raised by the mortgagor, such a condition would most likely be held to render the whole bond void, as being illegal and evasive of the usury laws (*w*). And there can be no doubt that such conditions are (under the old law) in most instances usurious in their nature.

In the case of *Hunoomanpersaud Panday* (*x*) to which there has been occasion to refer so frequently, the mortgagee was put in possession under a lease at a fixed rent, and claimed not to be liable to account for the sums received by him; but the Privy Council ruled that the lease was merely part of the mortgage security and was intended to create not a distinct estate, but only a security for the mortgage money. "As it was not meant that the principal should be risked, it was virtually a provision to exclude an account of the rents and profits, and the decree of the Sudder Dewanny Adawlut, directing an account of

(*u*) S. D. A. 1848, p. 872.
(*v*) N. W. P. v. 7, p. 307.
(*w*) S. D. A. 1851, p. 632 : N. W. P. v. 5, p. 456. See Sel. Rep. p. 119.
(*x*) 6 Moore's Ind. Ap. p. 393.

the actual rents and profits, therefore proceeds on the right principle and is in accordance with the true nature of the security and the spirit of the Regulations:"—and their Lordships added that, under the Regulations, unless the principal is meant to be risked, and is put in risk, the estate created as part of a mortgage security, whatever be its form or duration, can be received only as a security for the mortgage debt, and must be restored when the debt, interest, and costs are satisfied by receipts.

In contracts made after Act XXVIII of 1855 came into force, conditions that the mortgagee shall not be called on to account and the like may be legal; for in such contracts interest is to be calculated at the rate stipulated therein (*y*), and an agreement that the usufruct of property mortgaged shall be allowed in lieu of interest will be enforced (*z*).

The old rules against usury do not apply to cases in which the principal money is meant to be risked, the Regulations being held to refer only to common cases, where there is supposed to be fair security for the principal (*a*). If the lender risks his money, this is considered a sufficient ground for extraordinary interest being allowed him (*b*).

This principle is recognised in a case which is reported as one of usury, though not in fact coming under that head at all. A bond for rupees 4,000, with interest at 12 per cent., was bought up for rupees 1,000, the seller covenanting for title. The purchaser sued the parties liable on the bond, and the Court held that the transaction was not usurious, the purchaser having paid rupees 1,000, for the chance of getting rupees 4,000, but having risked the loss of the whole (*c*). It seems here to have been forgotten, that in one case only can a contract be usurious, namely, where there is an agreement that the borrower shall pay,

(*y*) Sec. 6.

(*z*) Sec. 4.

(*a*) See *Hunoomanpersaud Panday's* case, *supra*, p. 54.

(*b*) S. D. A. 1849, p. 134: 1857. p. 1232. See a rather absurd judgment 3 Sel. Rep. p. 261.

(*c*) S. D. A. 1852, p. 542.

in the whole, more than the sum received by him with legal interest. If the contract was not usurious from the first, no dealing between the lender and a third party could make it so. The price paid by the purchaser of the lender's rights, could not by any possibility affect the nature of the contract. The borrower, so long as his own position was not interfered with, had nothing to do with any arrangements between the lender and a purchaser from him, and ought not to have been allowed to go into the matter at all.

It has been held that when the suit in which the evasive nature of the transaction is shown, is one brought by the borrower, the provisions of the law by which neither principal nor interest are recoverable will not be put in force, unless the plaintiff expressly pleads that his case falls within those provisions (*d*), and that a person pleading a plea of usury, will be bound by the terms of his plea, and will obtain no relief but that which he seeks (*e*).

It not unfrequently happens, that one who has lent money on mortgage, subsequently makes further advances to the mortgagor, it being agreed that the property mortgaged shall be charged with the re-payment of these further advances (*f*): "The practice of taking bonds of subsequent date to the original mortgage, which is thereby rendered liable for the discharge of the aggregate amount, is far from uncommon, and has been fully recognized by the Courts" (*g*). In such cases, the land will be considered as mortgaged for the aggregate amount of the original and subsequent loans. It is, however, only when it is expressly agreed that the subsequent loan shall be a further charge upon the land, that it will be treated as such (*h*).

If loans are made by way of further charge and questions

(*d*) S. D. A. 1852, p. 678.

(*e*) S. D. A. 1852. p. 678. See 1853, p. 259 : 1858, p. 1321.

(*f*) N. W. P. v. 7, pp. 34, 248, 607: v. 8, pp. 112, 692 and 726.

(*g*) N. W. P. v. 8, p. 726.

(*h*) N. W. P. v. 9. p, 465 : 1860, p. 122.

as to priority arise, the mortgage will, no doubt, as to each particular sum, be considered to bear date only from the time when that sum was charged on the mortgaged lands, and will not, as to the subsequent advances, take the date of the original mortgage contract. But there are no reported cases in which the question of priority has been satisfactorily discussed or decided: and it is scarcely possible to draw any distinct deduction from the few cases which exist, bearing on the point.

In a case (*i*) in which it was held by the Lower Court that a subsequent mortgage deed was tacked to a prior one, an objection was raised to the mode in which the accounts had been taken. The later deed contained a stipulation that the interest should be paid "when the mortgage was redeemed," while the original deed provided that it should be paid "before the principal." The Court in taking the accounts upon the two mortgages together, allowed "intermediate" interest. It was contended that this was wrong, and that the principal should have been first credited. The Appellate Court thus disposes of the objection: "With respect to this plea, the Court are of opinion that as it has been ruled that the bond of the 3rd April 1846 was tacked to the original mortgage debt, it must be accounted for agreeably to the same rule as the original mortgage debt itself, viz. that which is fixed by the practice of this Court for the general adjustment of mortgage accounts and without advertence to the special stipulations of this bond. It cannot be regarded, as the appellants would wish it to be, as a perfectly separate and independent loan transaction."

In another case (*j*) the Lower Court gave a judgment which contained the following passage: "The mortgagor Chujjoo Mull (defendant) urges, that the property was in his possession long before plaintiff's mortgage. But all former deeds by which he held, are annulled by the last one, under which he holds possession at present. If this

(*i*) N. W. P. v. 9, p. 465. (*j*) N. W. P. v. 7, p. 34.

were not the case, there was no use in writing a new deed: as this deed is clearly of a subsequent date to that of plaintiff's, it follows that plaintiff holds a prior lien on the property." On this the Agra Sudder Court remarks: "The Court are unanimous in recording their dissent from the doctrine propounded in the foregoing extract. They observe that the 'former deeds' held by the appellant Chujjoo Mull, are by no means 'annulled by the last one, under which he holds possession at present.' They are, it is true, *superseded* by the latter deed; but up to the time of the latter instrument's execution, the previous deeds, if genuine, must be held to be in full force. The Judge's remark that 'if this were not the case, there was no use in writing a new deed,' is founded on an erroneous view of the case. There was an *obvious* use in the new deed, as it included fresh demands of Chujjoo Mull against the subscribing parties for which the former deeds provided no security; and the amount specified in the new bond, represented the consolidated sum due to the bondholder up to that date, and *repledged* the property, which had been theretofore hypothecated for a smaller sum. Equally unsound is the Judge's declaration 'that as this deed is clearly of a subsequent date to the plaintiff's, it follows that the plaintiff holds a prior lien on the property.' If this doctrine were admitted, a wide door would be opened to fraud; a dishonest debtor, simply by ante-dating a bond, might invalidate a genuine deed of later date. The question for decision in the present case is, not the order of dates in the conflicting deeds, but whether the owners of the property in dispute were competent to execute the bond which constitutes the plaintiff's cause of action, which they clearly were *not* if the authenticity of Chujjoo Mull's deeds of the 8th October, 1824, and 17th April, 1833, be admitted,"—which deeds, or one of them, must apparently have contained a proviso against alienation by the mortgagor until the debt was paid off.

The further charge ought to be made by a new deed applicable only to the sum to be charged: and when the original mortgage deed is thrown aside, and a fresh deed executed, by which the property is mortgaged for the consolidated sum, there is danger of the original mortgage as well as the further charge, being held to rank only from the date of the later deed.

This observation, however, is not supported by the case last referred to (*k*), nor by the following case, which in truth is not one of further charge at all.

A mortgagor having made some payments, the accounts between him and the mortgagee were made up, and a fresh mortgage deed executed which, after reciting the previous mortgage and the payments in respect of it, again mortgaged the same property on the same terms as those contained in the original mortgage deed, as a security for the unliquidated balance. The original mortgage deed was then given up and cancelled. The mortgagor had mortgaged the same property to a third party subsequent to the date of the original mortgage, but prior to the mortgage given as security for the unliquidated balance. The Court considered that the mortgage for the unliquidated balance was merely a *continuation* of the first mortgage, and that the substitution of the last deed for the first did not terminate the first mortgage, or give priority to the third party to whom the property had been intermediately mortgaged (*l*).

When a person admits having executed a written instrument which contains a recital that the consideration has been received, but seeks to avoid liability by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt rests upon *him*, and in the absence of proof he must be held to the terms of the document to which he has deliberately affixed his signature. The written instrument

(*k*) N. W. P. v. 7, p. 34.

(*l*) S. D. A. 1856, p. 942: 1857, p. 1184.

is *primâ facie* evidence that the consideration has been received as recited, but it is not conclusive; and this *primâ facie* evidence may be rebutted (*m*).

In a case where a recital of payment of consideration was made with a fraudulent object, the Court refused to allow oral evidence to be given to prove that no consideration had in fact been paid (*n*).

(*m*) See the judgment of the Privy Council in the case of *Chowdry Deby Persad* v. *Chowdry Dowlut Sing*, 3 Moore's Ind. Ap. p. 346, 6 W. R. p. 55 (P. C.): 7 W. R. p. 441. See also on this subject S. D. A. 1857, pp. 925, 1114: 1858, pp. 41, 55, 812, 1287, 1321: 1859, pp. 113, 1251: 1860, p. 419. 7 W. R. p. 428. The cases, W. R. 1864, p. 197: 3 W. R. p. 111, and 5 W. R. p. 203 are probably bad in law.

(*n*) 7 W. R. p. 334.

CHAPTER V.

OF THE REGISTRATION OF DEEDS.

No particular ceremony is required on the execution of a deed: but it should be executed in the presence of at least two credible witnesses. A deed is not void simply because some of those who are named as parties to it do not sign it, and are not present at its execution by the others. In such a case the deed will, so far as circumstances admit, be binding on those who execute it, but it will not affect those who do not (*o*).

Delivery of the deed which evidences the transfer of property is not a necessary condition to the perfectness of the conveyance; but, generally speaking, delivery evidences the completeness of the transaction, and non-delivery will necessarily operate very powerfully to bar the recognition of any claim founded upon the deed (*p*).

In a case of the sale of land, it was held that the right of *property* had passed to the purchaser on the execution and delivery of the deed of conveyance and payment by him of part of the purchase money, but that the right of *possession* would remain in the vendor until the residue of the purchase money was paid (*q*). "The contract of sale is, speaking generally, perfected by consent alone,

(*o*) N. W. P. v. 11, p. 72. As to presumption of consent arising from signing a deed merely as a witness, see *supra*, p. 27.

(*p*) N. W. P. v. 4, p. 219; see v. 5, p. 364.

(*q*) S. D. A. 1860, p. 419.

and in the present case is evidenced by the execution and delivery of the deed of conveyance on the part of the seller and by the payment by the purchaser of a portion of the price agreed to."

It is generally to the advantage of all parties concerned, especially of mortgagees, to give as much publicity as possible to all contracts regarding land: and they ought to be brought forward on any occasion on which the rights of parties in the pledged land are under discussion,—as for example when a settlement is going on (*r*). And any collateral or other deed favourable to himself which the mortgagee may have, should be on all occasions brought forward by him, along with the mortgage deed.

A mortgagee produced an ikrarnama alleged to have been executed three days after the mortgage deed, and containing terms much more favourable to him than were those of the deed. But the ikrarnama was rejected by the Court, because when application was made by the mortgagee for mutation of names in the malgoozaree register, the only deed mentioned or produced before the Collector, was the mortgage deed. The Court remarked, that if individuals will not avail themselves of the simple and obvious means afforded of giving publicity to these transactions regarding land, they have only themselves to blame if the reality of the transactions is doubted when they are, after a lengthened interval, for the first time declared to have taken place (*s*).

Registration must be considered with reference to the old law and to the new,—by which latter term the Acts XVI of 1864 and XX of 1866 are meant. Under the old law, the registration of documents was voluntary: under the new law it is practically compulsory, as regards mortgages.

First, as to the old law, which relates to instruments executed prior to the 1st of January, 1865.

The fact of a deed not having been registered, creates a

(*r*) N. W. P. v. 5, p. 333: v. 8, p. 542. S. D. A. 1855, p. 218.

(*s*) N. W. P. v. 8, p. 601.

presumption against its genuineness, other things being suspicious (*t*). On the other hand, it has been said that a deed which has been registered and publicly made known at the time of execution, will not be set aside except on strong grounds (*u*).

But an *intention* to register is of no avail: it must be followed by actual registration (*v*).

The registration should be made as soon as possible after execution, and in the district where the lands to which the deed refers are situated. Registration in a different district, creates a presumption against the deed (*w*).

A deed of mortgage which has been registered, will be entitled to satisfaction in preference to any other mortgage on the same property, whether of prior or subsequent date, which may not have been registered (*x*). And the fact of the person who obtains priority of registration of his deed, having at the time of registering, full notice or being aware of the existence of an earlier but unregistered deed, does not prevent his deed from having the preference (*y*).

Act XIX of 1843 gives preference to registered, over unregistered deeds, only when the deeds are of the same character; and therefore, a registered deed of sale does not take priority over an unregistered mortgage deed of earlier date,—nor *vice versâ*. And a subsequent purchaser whose deed is registered, takes the property subject to a prior mortgage though it be not registered (*z*).

(*t*) S. D. A. 1854, p. 529: 1855, p. 218. N. W. P. v. 10, pp. 290, 608.

(*u*) N. W. P. v. 9, 481: S. D. A. 1856, p. 615: 1857, pp. 208, 956.

(*v*) S. D. A. 1857, p. 840.

(*w*) N. W. P. v. 9, p. 149. See S. D. A. 1859, p. 1059.

(*x*) Act XIX. of 1843.

(*y*) Act XIX of 1843, Sec. 2. *Sreenath Bhuttacharjee* v. *Ramcomul Gangooly*, 10 Moore's Ind. Ap. p. 220, Suth. P. C. p. 600. N. W. P. v. 6, p, 266: S. D. A. 1853, p. 335.

(*z*) S. D. A. 1852, p. 987: 1850, p. 77: 1857, p. 1667. N. W. P. v. 7, 124: 1860, p. 93. W. R. 1864, p. 141: 5 W. R. p. 61. *Varden Seth Sam* v. *Luckpathy Royjee Lallah*. 9 Moore's Ind. Ap. p. 303, Marsh. p. 461.

In the case of *Maharajah Mohesher Bux* v. *Bhikha Chowdry*, (heard by a Full Bench), the plaintiff claimed to have a lien under an unregistered bond, upon lands held by the defendant who was the purchaser in possession under a deed of sale later in date than the bond, but duly registered. It was contended that the purchaser was a *bonâ fide* purchaser without notice, and therefore entitled to priority. The Chief Justice, in delivering his judgment said (*a*): "If the bond was really and *bonâ fide* executed before the date of the defendant's purchase, it would *primâ facie* be entitled to priority, and the defendant could not, according to the decision in the case of *Varden Seth Sam*, succeed without proof that he was a *bonâ fide* purchaser for value without notice. But even if the defendant was to satisfy the Court upon that point, he could not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of the bond. If he was not bound to register it, in order to retain priority over subsequent purchasers for value, I do not see what notice he could give or was bound to give * * * * If the defendant should prove that he was a *bonâ fide* purchaser for value, he would throw the *onus* on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase."

A simple mortgagee sold the mortgaged property under a decree: a second mortgagee who had subsequently obtained a decree attached the sale proceeds in satisfaction of his (the second mortgagee's) claim, on the ground that although his deed and decree were the later in date, his deed was registered, while that of the first mortgagee was not. The title of the first mortgagee was upheld (*b*).

But registration will not give precedence to a subsequent purchaser when a prior *bonâ fide* purchaser has actually been put in possession under his unregistered deed (*c*).

(*a*) 5 W. R. p. 63. (*b*) S. D. A. 1857, p. 147.
(*c*) S. D. A. 1857, p. 1621.

Where there is a contract to sell land at a future period, and a payment of part of the purchase money,—this contract, though unregistered, will be given effect to as against a subsequent purchaser or mortgagee with notice, although the deed under which the latter claims may have been registered (*d*).

Under Act XIX of 1843, the authenticity of the deed which is relied on, must be established to the satisfaction of the Court, and the Court must decide the question of authenticity, before deciding which deed is to have the preference. Where there were two sales, the first a *bonâ fide* one, but unregistered, the second a fictitious one, but registered, it was held that the deed recording a sale which never in fact took place, and for which no consideration was paid, could not be considered "authentic" under the terms of the Act, and that, therefore, its being registered, did not give it priority over the other. "There was no sale at all, but a mere pretence. A deed recording a fictitious sale cannot be considered authentic: an authentic document must be a record of a real or actual transaction, not of a fictitious one" (*e*).

In the case of *Sreenath Bhuttacharjee* v. *Ramcomul Gangooly* (*f*), the Privy Council in delivering judgment said: "the proviso is, that the authenticity of the deed be established to the satisfaction of the Court. The word 'authenticity' would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act. But their Lordships think that it could not be intended by the Act, that a deed which was tainted by fraud, though in other respects genuine, should be placed on the same footing as an honest *bonâ fide* deed. They are not disposed so to construe the Act;

(*d*) 3 W. R. p. 64. See 3 W. R. p. 104.

(*e*) S. D. A. 1853, p. 245: 1858, pp. 960, 1051. N. W. P. v. 8, p. 297: v. 9, p. 149: 1860, p. 267: 1 Hay, p. 261: 3 W. R. p. 216: 8 W. R. p. 300.

(*f*) 10 Moore's Ind. Ap. p. 220, Suth. P. C. p. 600.

but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee."

Under the old registration law, it was the duty of the Registrar to inquire into and ascertain the due execution of a deed presented to him, before admitting it to registration; but he had no right whatever to institute any inquiry as to the consideration which had passed (*g*). And an acknowledgement of payment of the consideration, if made before the registrar, has been held to be a mere form and no evidence (*h*). There can, however, be no sort of doubt that such an acknowledgement is just as little a mere form and is just as good evidence if made before a Registrar, as if it is made before any other person. It may have been no part of the business of the Registrars to take such acknowledgements. But if, as a matter of fact, they have been made and can be satisfactorily proved, the Court is bound to receive them in evidence, and to give the same weight to them as if they had been made to a person not a Registrar.

The above remarks apply more particularly to cases arising under the old law, which relates to all instruments executed prior to the 1st of January 1865.

Under the new Registration law, Act XX of 1866, registration is compulsory in all cases where the value of the property mortgaged is one hundred rupees or upwards (*i*). If the property be less than one hundred rupees in value, the registration is optional (*j*). When registration is compulsory, the instrument must be presented to the registrar within four months from the date of its execution (*k*): when it is optional, the instrument must be presented within two

(*g*) The Agra Sudder Court (No. 803, 19th June 1850) to the Judge of Bareilly. Rep. Sel. Com. on Indian Territories, 1852, Ap. p. 614.

(*h*) N. W. P. v. 9, p. 183. But see S. D. A. 1856, p. 469.

(*i*) Sec. 17.

(*j*) Sec. 18.

(*k*) Sec. 22.

months (*l*). But if any instrument shall, owing to urgent necessity or unavoidable accident, not have been presented for registration till after the expiration of the prescribed time, the registrar may, if the delay in presentation does not exceed four months, direct the instrument to be registered on payment as a penalty of a sum not exceeding twenty times the amount of the proper registration fee (*m*).

When the last day for registration falls on a Sunday or holiday, it will be sufficient if the instrument is presented for registration on the day immediately following such Sunday or holiday (*n*).

A registered document operates from the time when it would have commenced to operate if no registration of it were required or made, and not from the time of its registration (*o*).

All instruments duly registered take effect against any oral agreement or declaration relating to the same property (*p*). And no instrument which is *required* to be registered (*q*) shall be received in evidence in any civil proceeding in any Court, or shall be acted on by any public servant, or shall affect any property comprised in it, unless it has been duly registered (*r*).

If an instrument, the registration of which is optional (*s*) is registered, it takes effect as regards the property comprised in it, against every unregistered instrument relating to the same property, whether such other instrument be of the same nature as the registered instrument or not.

Such are the general provisions of Act XX of 1866, which came into force on the 1st of May, 1866. It is in substance similar to (though differing in some important respects from) Act XVI of 1864 which was in force from the 1st of January, 1865.

(*l*) Sec. 23.
(*m*) Sec. 24.
(*n*) Sec. 25.
(*o*) Sec. 47.
(*p*) Sec. 48.
(*q*) See sec. 17.
(*r*) Sec. 49. See 1 Agra, F. B. p. 148.
(*s*) See sec. 18.

It is impossible for intending mortgagees to be too particular or careful as to the registration of their instruments of mortgage. Their whole security depends upon registration and it ought always to be insisted upon and carried out with the utmost strictness and at the earliest possible moment.

Among other particulars which are to be endorsed by the Registrar upon every document admitted to registration (*t*), are the following—" any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration made in his presence in reference to such execution." So that if the parties choose to avail themselves of the provisions of the law, they may at the same time that they register their deeds, secure the means of being able to give satisfactory proof of the consideration. This is under the present Registration Act. But admissions of receipt of consideration are not among the particulars which the Registrar was directed by Act XVI of 1864, sec. 36, to endorse: and an admission of payment of consideration, made to the registering officer who was registering a bill of sale under that Act does not prevent inquiry into the fact of payment (*u*).

It has been decided, under Act XVI of 1864, that where an instrument has not been presented at all for registration within the prescribed time, a Registrar has no power to register it whether under a decree of Court or otherwise. It is only when an instrument has been presented in such time that under the Act the Registrar has power to receive it, and the Registrar has refused for no good reason to register, that he can be ordered by the Courts to register the instrument after the period fixed in the Act has elapsed (*v*).

In a recent case it appeared that the defendants after executing a bill of sale in respect of certain lands, and

(*t*) Sec. 66. cl. 3.

(*u* 1 Agra, p. 160.

(*v*) 7 W. R. pp. 112, 150.

after receiving the full purchase money refused to register the bill of sale or to give up possession. It was held that though the deed, not having been registered, could not (under section 13 of Act XVI. of 1864) be admitted as evidence in a suit by the purchaser for a declaration of his title for possession, the purchaser might nevertheless prove his title by giving oral evidence of the terms of his contract (*w*). The soundness of this decision may however, be very much questioned. The purchaser no doubt might have had his remedy in another shape, as by a suit for specific performance, or for damages, or to recover the purchase money he had paid. But the contract being once reduced to writing and signed by the parties, to allow the purchaser to give oral evidence of the contract is to evade the provisions of the Registration law, and to break through the rule that a contract once reduced to writing can be proved only by the writing itself. The decision in question is moreover in direct conflict with an earlier decision of another Court in which the Judges said, "We think that the course which the Judge directed the first Court to pursue, namely to allow the plaintiff to prove her title by parol evidence is erroneous and utterly subversive of the object of the Registration Act. When a party comes into Court, resting his claim on a written title which the law required to be registered, he cannot when he has failed to register, and is in consequence unable to use his title deed, turn round and say 'I can prove my title by secondary evidence.' It would be useless to have a compulsory Registration Act, if such a course were open to suitors" (*x*).

Section 15 of Act XVI of 1864 applies only to cases in which the Registrar has refused, when under the circumstances he ought not to have refused, to register (*y*). The Act contains nothing to limit or affect the right conferred by law on a purchaser to enforce specific performance of the contract of sale: and the sections of

(*w*) 9 W. R. p. 351.
(*x*) 7 W. R. p. 112.
(*y*) 6 W. R. 61. Misc.

the Code of Civil Procedure relating to decrees and the execution of decrees, have made sufficient provision for compelling a complete performance of the contract, whether by execution of a conveyance, or by its registration, or otherwise (*z*).

When a registered instrument would ordinarily have priority (under section 68 of Act XVI of 1864) to an unregistered deed of earlier date—it is necessary, for the purpose of impeaching the registered deed and preventing it having priority, to shew that the registered deed was fraudulently executed, and that the purchaser was wilfully a party to the fraud of the vendor (*a*).

A certificate of registration is evidence, under Act XVI of 1864, that the instrument to which the certificate relates was registered, but not that it was executed (*b*). And under section 68 of Act XX of 1866 the certificate is *primâ facie* evidence that the document has been duly registered, and also that the facts mentioned in the endorsement made on the instrument by the Registrar have occurred as mentioned therein.

A Registrar to whom a deed was presented for registration under Act XVI of 1864 had nothing whatever to do with its recitals or its possible operation as regards third parties. All the Registrar had to inquire into was "whether the instrument was executed or not by all the parties thereto by whom it purports to have been executed," and to satisfy himself of the representative character of any one claiming to represent, or to the entitled to act for, any party to the deed. If the Registrar had no doubt that the instrument really was executed by those by whom it purported to have been executed, it was his clear duty to register it (*c*). And the rule is the same under Act XX of 1866.

The registration of a money-bond in which land is pledged as a collateral security, is optional (under clause 7,

(*z*) 1 Agra F. B. p. 148.
(*a*) 7 W. R. p. 119.
(*b*) 6 W R. p. 105.
(*c*) 6 W. R. p. 131, Misc.

sec. 18, Act XX of 1866) so far as it is a mere bond for money. Although unregistered, such a bond is admissible in evidence in a suit for the money due on it: but it would not be admissible in a suit to have it declared that the debt was secured by a mortgage of the land (*d*).

(*d*) 9 W. R. p. 111.

CHAPTER VI.

OF STAMPS ON MORTGAGE DEEDS.

All mortgage deeds must be written on stamped paper. A deed which ought to be, but is not, stamped cannot be used in enforcing the rights passed by it: practically, therefore, no instrument of mortgage is effective so long as it is not duly stamped. It may be possible to stamp a deed after execution (*e*); but this is not always the case, and when it is, a heavy penalty has to be paid for the privilege.

All deeds executed prior to the 1st day of October 1860, when Act XXXVI of 1860 came into force, must be stamped in accordance with Reg. X 1829. Deeds executed on or after the 1st of October 1860, but before the 1st of June 1862, must be stamped as provided in Act XXXVI of 1860. Deeds executed on or after the 1st of June 1862 must be stamped in the manner prescribed by Act X of 1862.

As to deeds executed before the 1st of October 1860.

All such deeds must be stamped as provided for by Reg. X. 1829 (*f*). Under a general rule in schedule A annex-

(*e*) Reg. X. 1829, sec. 14 : Act XXXVI of 1860, sec. 13 : Act X of 1862, secs. 15, 17.

(*f*) Article 35 of Schedule A, Reg. X 1829 declares that every deed of mortgage or conditional sale, kut-kubala, bye-bil-wufa, bhog-banduk, &c., with or without possession given, of or for any lands estate or property, real or personal, intended as a security for money due or to be lent thereupon, also every deed or contract accompanied with a deposit of title deeds to any property, when the same may be made as the security for the payment of money due or lent at the time, is to be charged with such stamp duty as is in the Regulation declared.

ed to this Regulation, the Courts used to hold strictly that if the signature or seals of the parties and witnesses to a deed were not all written on the sheet bearing the stamp, the deed was illegally executed and could not be treated as duly stamped (*g*). But the law is now different, for the general rule referred to was repealed by Act XLI of 1858, sec. 2 (*h*).

When the mortgage deed contains any matter beyond that which is incidental to the mortgage, the same duties are payable as if the mortgage and other matter had been contained in separate instruments.

A suit was brought to recover money advanced upon the granting of a lease. The document was a ticca zur-i-peshgee, and apparently was a bond for the sum lent, with interest, accompanied by an agreement that the mortgagee should hold the lands at an annual rent of Rupees 500, to run on till the advance was paid off. The deed was stamped as a simple bond, and the mortgagee sued on it as such, seeking, not to obtain possession, but only to recover the money lent by him. It was held, that this instrument required the stamp of a lease, and that it was not sufficient that it should be stamped as a bond, the stamp for a simple bond being of smaller value than that for a lease (*i*).

The stamp to be imposed on a document is the largest applicable to its nature, not that required by the nature of the suit; for example, in the case just quoted, though the instrument was sued on as a bond, it still required to bear the stamp of a lease.

A mortgage in the form of a zur-i-peshgee lease, contained a covenant for payment on a certain date of the money advanced: it also contained a condition that the lessee

(*g*) S. D. A. 1853, p. 965 : 1854, p. 464 : 1856, p. 556 : 1858, pp. 477, 504.

(*h*) Since virtually repealed by the repeal of Reg. X. 1829. But it still has operation in all cases coming under Reg. X. 1829. See S. D. A. 1859, pp. 70, 1519 : 1860, v. 1, pp. 498, 700.

(*i*) S. D. A. 1853, p. 269.

and mortgagee should pay annually, according to fixed *kists*, without fail or excuse, a rent of Rupees 1,866 to the lessor and mortgagor, and should appropriate the remainder of the estimated assets, or Rupees 1,200, and as much more as he could collect,—the mehal not being redeemable till, either on the expiry of the prescribed term or subsequently, the whole principal sum should be re-paid. The document was stamped as a conveyance, with a Rs. 50 stamp; which was less than the duties would have come to, had it been stamped both as a bond or mortgage and as a lease. A suit was brought on it as a bond, for the recovery of the money advanced. The Court said, "they did not doubt that the engagement between the parties in this case, must be regarded as including two separate contracts,—the one of lease, for the annual payment to the lessor, under all circumstances, of Rs. 1,866,—the other of mortgage, as to the enjoyment by the mortgagee of the residue of the rents, after the payment of the reserved rent of Rs. 1,866, as a security for the profits or interest on the amount of his money advanced. Upon fulfilling the conditions of the lease, the lessee or mortgagee would have his right to retain the property with its remaining profits, as a security for the money lent by him; but there was a distinct and certain stipulation of prior payment of rent to the lessor (not merely of Government revenue), before the mortgage lien could attach to the residue. The document was not one which, in the case before the Court, could be broken into parts, if such a division could in any case be made. Each of the two contracts must bear its own appropriate stamp, — or Rs. 40 for the mortgage, and Rs. 12 for the lease,— calculated on the reserved rent of Rs. 1,866. The provisions of the law could not be dispensed with, merely because the two contracts were written on one paper" (*j*). And so, in a later case (*k*).

But if the double matter be immaterial, and can be

(*j*) S. D. A. 1853, p. 569. (*k*) S. D. A. 1853, p. 942.

treated as mere surplusage, there need be no stamp in respect of it (*l*).

Under Reg. X. 1829 it was ruled that not only was it necessary that documents should bear stamps of the proper value, before they could be received in evidence, but such stamps must have been imposed,—in the case of a plaintiff, previous to the institution of the suit,—in the case of a defendant, previous to the filing of the plea, in support of which it was proposed to make use of the document (*m*).

As to deeds executed on or after the 1*st of October* 1860, *but before the* 1*st of June* 1862.

Act XXXVI of 1860 is so similar to Act X of 1862 that it seems sufficient for the purposes of this treatise that the latter only should be given in detail. The two Acts do nevertheless differ in various points, and it will therefore be necessary to refer to Act XXXVI of 1860 itself, in all cases which come within its provisions.

As to deeds executed on or after the 1*st of June* 1862,—the whole law on the subject is to be found in Act X of 1862.

Every deed of mortgage (*n*) or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgment in the nature of a mortgage, conditional sale, pledge, or hypothecation of or in respect of any immoveable property with or without possession given, or of any personal property without possession given, intended as a security for money due or to be lent thereupon; and every deed or contract accompanied with a deposit of title deeds to any property where the same is made as security for the payment of money due or lent at the time—must bear the same

(*l*) S. D. A. 1853, p. 828.

(*m*) S. D. A. 1852, pp. 41, 84, 497, 996, 1000, 1032, 1068, *et passim*. See N. W. P. v. 10, p. 459.

(*n*) Act X of 1862, Schedule A, Art. 46.

stamp as is required for a bond for the payment of the amount due or lent (*o*).

Every deed of mortgage or conditional sale, assignment, pledge, or hypothecation, or of any acknowledgement in the nature of a mortgage, conditional sale, assignment, pledge, or hypothecation given for a loan or advance made on the deposit of any personal property *(p)*, must be stamped as a promissory note (*q*).

Every deed of mortgage or conditional sale, assignment, pledge, or hypothecation, with or without possession given of any immoveable property or of any right, title, or interest therein, intended as security for the transfer of a Government security, or for the payment of an annuity for a fixed period, or for the delivery at a future date of any matter or thing capable of being valued, is to be stamped (*r*) as a bond for the total amount assured, or for the *bonâ fide* value.

Every deed of mortgage, or conditional sale, assignment, pledge, or hypothecation with or without possession given of any immoveable property, or of any right, title or interest therein, given for the security of an annuity for an indefinite period, such as a life annuity, is to bear the same stamp as for ten times the annual payment. If it is stipulated that the amount secured by such mortgage shall not exceed a certain sum, it must have the same stamp as for a deed of mortgage of such limited sum: but when the total amount secured by the mortgage is unlimited, an *optional* stamp (*s*).

(*o*) Art. 12 gives the stamp duty payable in respect of a bond or other obligation for the payment either absolutely or conditionally of any definite or certain sum of money.

(*p*) Art. 47.

(*q*) Promissory notes are to be stamped like Bills of Exchange, and Art. 10 lays down the rates for Bills of Exchange.

(*r*) Art. 48.

(*s*) Art. 49. See Sec. 27, which enacts that "No larger sum shall be recoverable in any Court of Justice by reason of any deed, instrument, or writing, for which an optional stamp is indicated to be

For every deed of mortgage where a bond shall have been already taken for the amount secured, or where, from any other cause, the mortgage shall act merely as a collateral security to some other transaction in which an instrument requiring a stamp has been executed, the stamp (*t*) must be the same as for the bond or other instrument if of value not exceeding eight Rupees,—otherwise a stamp of eight Rupees must be imposed.

Where there are more deeds than one required to execute a mortgage in the manner desired by the parties, then for every other deed than the principal deed (provided the original deed has been duly stamped) the same stamp is required as for the principal deed if of value not exceeding eight Rupees,—otherwise a stamp of eight Rupees (*u*).

Letters of hypothecation accompanying a Bill of Exchange require no stamp (*v*).

A re-conveyance of mortgaged property must be stamped as an assignment (*w*) : and a release of an equity of redemption as a conveyance (*x*).

A deed may be written on one or more stamps, if the aggregate value of the stamps used amount to the value required by the law (*y*).

proper by the Schedule A annexed to this Act, than the largest sum for which, if specially stated in a deed, instrument, or writing of the same denomination, the stamp actually used under the option so given would be of sufficient value. And no such deed, instrument or writing shall be held by any Court of Justice to be valid in respect to any sum of money larger than that for which the stamp on the said deed, instrument, or writing would be sufficient."

(*t*) Art. 50.

(*u*) Art. 50, *note*.

(*v*) *Ibid. Exemption.*

(*w*) Art. 51 : *i. e.* it must have the same stamp as the original deed if the original deed be on a stamp of less than 8 rupees, and in any other case a stamp of 8 rupees. Art. 9.

(*x*) Art. 52. Art. 23 declares the stamps leviable on conveyances.

(*y*) Act X of 1862, *note* (*a*) to general exemptions at the end of Schedule A.

And when of several deeds or writings a doubt shall arise as to which is the principal, the parties may determine for themselves which shall be so deemed: but if there are more deeds than one, every other deed than the principal requires the same stamp as the principal deed, if of value not exceeding eight rupees (which is the maximum stamp for collateral deeds), and every such collateral deed shall specify which other is the principal deed and certify that it is executed on the proper stamp (*z*).

An agreement or memorandum in the nature of a mortgage must be stamped as a mortgage (*a*).

As a rule, it will lie upon the Courts in each case to decide whether deeds which are produced in evidence are properly stamped. But if before execution, the parties having doubts as to the amount of stamp required, apply to the Revenue authorities, and pay a fee of ten rupees, those authorities will decide what stamp is required, and will stamp the deed accordingly: and a deed so stamped will be received in every Court as properly stamped (*b*). And when a deed has on payment of penalties been stamped subsequent to execution, the stamp impressed shall be taken in all Courts to be the proper stamp (*c*). In any case in which a mortgage deed might (under Sec. 15 of Act X of 1862) be stamped by the Revenue authorities after execution, any Civil Court may receive the deed in evidence, on payment into Court of the proper amount of stamp duty. The amount of stamp duty and of penalty to be paid in such a case, is to be determined by the Court, whose decision on the point is final (*d*).

The law as to the valuation of suits and the stamp duty on petitions of plaint or appeal, is to be found in Act X of 1862, as altered by Act XXVI of 1867.

All questions relating to the valuation of claims are to

(*z*) *Ibid. note* (*b*).
(*a*) Schedule A. Art. 1.
(*b*) Sec. 19.
(*c*) Secs. 15 and 16.
(*d*) Sec. 17.

be decided by the Court in which the claim is filed, subject to any appeal to which the orders of such Court are open (*e*). If at the hearing of a suit it proves to be under-valued, and if the Court would not have jurisdiction to entertain it if properly valued, the suit ought to be dismissed (*f*).

When a mortgagee is in possession under a simple usufructuary mortgage, and the mortgagor sues to recover possession on the ground that the debt has been paid off, the valuation of the suit should have reference not to the value of the mortgaged property, but to the value of the lien for the mortgage debt or incumbrance (*g*).

(*e*) Act X of 1862, Sec. 32.
(*f*) 8 W. R. p. 47.
(*g*) 1 Agra F. B. p. 159.

CHAPTER VII.

OF THE RELATIVE ESTATES AND DUTIES OF THE MORTGAGOR AND THE MORTGAGEE.

On the execution of the mortgage, the proprietary right still remains in the mortgagor, even although the possessory right may have passed to the mortgagee.

Whichever party has possession, whether he be the mortgagor, or the mortgagee, is in the position of a trustee: he is not the absolute owner of the land, but holds it subject to the rights of the other. The mortgagor must use it as liable to become the property of the mortgagee, and must not do any thing that tends to injure or diminish the security on the strength of which he has received the money of the latter. The mortgagee in possession must, as a mere trustee for the mortgagor, manage the land according to the best of his ability, regulating the expenses carefully, and applying all the profits to the satisfaction of his claim: and he must take the same care of the estate as he would of his own, and must admit no claim upon it until assured of the title of the claimant (*h*). The mortgagee is in most cases liable to account for his management, the mortgagor never is so.

The mortgagee's rights are of course always subject to any lien or incumbrance, as a lease or a mortgage, existing prior to the date of his security. And he cannot

(*h*) S. D. A. 1859, p. 1273.

repudiate engagements binding the land, previously entered into by the mortgagor (*i*).

A mortgagee who is entitled to possession, has generally a right to have his name registered in the Collector's books as mortgagee, in the place of that of the mortgagor (*j*): and he has a right to appear at a revenue settlement as an objector to the settlement then made, or sometimes as a claimant of the settlement.

When a mortgagee of a "maafee" tenure was no party to resumption proceedings under Act X of 1859, Sec. 28, and the land was resumed with the mortgagor's consent, the mortgagee was held to be entitled to question the *bonâ fide* character of the resumption proceedings (*k*).

A person admitted to settlement as a shareholder, and who continues recorded as lumberdar, may sue to recover his share of the produce of the estate, without first bringing a suit to establish his right to possession. His being so admitted and recorded, gives him a *primâ facie* title to be heard on the merits of his claim (*l*).

In a pure usufructuary mortgage, the mortgagee has from the first a possessory right: but he never has any thing more, as the proprietary right remains always in the mortgagor. In simple mortgages, no proprietary or possessory right vests in the mortgagee at all, and he is not even in a position which entitles him to appear at a revenue settlement, either as a claimant, or in any other capacity (*m*). In mortgages by conditional sale, the proprietary right, and also the possessory vest in the mortgagee, when the term fixed for the re-payment of the loan has elapsed, and the process of foreclosure has been completed,—but not till then (*n*).

An estate was sold for arrears of revenue in 1840 under

(*i*) S. D. A. 1849, p. 341: N. W. P. v. 8, p. 515: v. 9, pp. 366, 585: v. 10, p. 408.

(*j*) See Reg. VIII. 1793, Sec. 28.

(*k*) 2 Agra, p. 117.

(*l*) N. W. P. v. 10, p. 494.

(*m*) N. W. P. v. 8, p. 489.

(*n*) S. D. A. 1849, p. 392. See N. W. P. v. 10, p. 453.

Reg. XI of 1822, which was then in force, and a mortgagee in possession sued under Sec. 25 of that Regulation to set aside the sale. It was held that his suit would not lie, as a mere mortgagee in possession has no right of ownership, and the Regulation gave the right of action to *proprietors* only (*o*). "The right of ownership in the mortgaged property does not pass to the mortgagee leaving only the equity of redemption to the mortgagor. The right of ownership, together with the right of redemption, remain with the mortgagor, and until the property be actually foreclosed and the sale become absolute, the right of ownership does not pass. The doctrine is equally applicable to conditional sales or usufructuary mortgages: it follows that the mortgagees in the present case who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such enjoyed no right of ownership. Such being the case, the registration of their names incorrectly as proprietors, or the entrance of their names in the sale advertisements as such, when in fact and admittedly they were no such thing, cannot alter the nature of their rights or convert a lower into a higher title. Being as they are usufructuaries, they should with a view of saving their right, have paid in the revenue and stayed the sale, and they would thus have had an action against the actual proprietors for money paid on their account to protect an interest of the payer in the property."

Where there was an usufructuary mortgage, and the mortgagee, having been ousted, sued to recover possession on the ground of proprietary right,—the Court held that his suit would not lie, as he had no proprietary right, and ought to have sued for possession merely as mortgagee (*p*).

It is the duty of a mortgagor to take all legal means to protect his rights in the property mortgaged by him:

(*o*) S. D. A. 1858, p. 840.

(*p*) N. W. P. v. 7, p. 5. See N. W. P. v. 11, p. 75.

and the mortgagee will be entitled to recover damages for any loss he may sustain through neglect of that duty (*q*).

The Government revenue is a charge upon the land out of which it is payable, which takes precedence of all other claims, and consequently a mortgage does not in fact pledge any thing more than the receipts in excess of the revenue due in respect of the lands mortgaged. It is therefore, *primâ facie*, the duty of the person who is in actual possession and registered as proprietor, to pay the Government revenue (*r*): and any loss consequent on the neglect of this duty, must be borne by him. Hence, if the property mortgaged by conditional sale remains in the possession of the mortgagor, and is sold for arrears of revenue (which has the effect of entirely defeating the mortgagee's security), the mortgagee may sue for, and recover from the mortgagor, the balance due to him, with interest,—instead of being left to his remedy against the land alone, as he otherwise would be (*s*). So, on the other hand, an usufructuary mortgagee, who, being in possession of the mortgaged estate, allowed the Government revenue to fall into arrears during his management, in consequence of which, the Collector farmed the property for some time, was held responsible for the profits of the term during which the Collector was in possession (*t*). And an usufructuary mortgagee has no claim against the mortgagor personally, for Government revenue paid by him while in possession, although such payments will be credited to him on adjusting the accounts between them. "The mortgagee has no right of separate action for the amount so paid, while he remains in possession"(*u*).

But it is only the revenue which accrues during the time of his possession, that the mortgagee is bound to pay:

(*q*) See S. D. A. 1857, p. 1195: 1853, p. 575.

(*r*) S. D. A. 1852, p. 678.

(*s*) S. D. A. 1848, p. 368.

(*t*) N. W. P. v. 3, p. 417; see v. 7, p. 7.

(*u*) S. D. A. 1852, p. 1063. See S. D. A. 1848, p. 346. and N. W. P. v. 9, p. 378.

all arrears fallen due before the date of his entry, remain payable by the mortgagor.

A mortgagee being in possession, the Collector came in and farmed the property, not on account of any fault or mismanagement on the part of the mortgagee, but for an old balance of revenue fallen due before the commencement of his interest as mortgagee. The mortgagee, after a time, came forward and paid up the arrears, whereupon a farming settlement of ten years was granted to him by the Collector. It was held, that the mortgagee was entitled to all the profits during these ten years, without rendering any account to the mortgagor: that he was in no way bound to pay the arrears, and having done so, must be treated as an entire stranger would have been, under similar circumstances (*v*). However, the Court expressed a doubt whether the Collector acted rightly in admitting the mortgagee in possession of the defaulting mehal, to engagements as farmer by the process of transfer.

If an estate is about to be sold for arrears of Government revenue which the mortgagor has failed to pay, the mortgagee may deposit the amount due, to be credited in payment of the arrear if the mortgagor does not ultimately pay the amount before the expiry of the prescribed time. And the mortgagee may recover what he has paid from the mortgagor with interest (*w*).

There was a mortgage of a *dur-putnee* tenure, the mortgagee not having possession. The putneedars fell into arrears, and the mortgagee paid the sum due and saved the tenure from sale. It was held that he could not recover the sum so paid from the putneedars, but that he had a good right of action for it as against the dur-putneedar, his own immediate mortgagor (*x*).

If one joint tenant pays the amount of Government revenue due for all, he can recover from the other joint

(*v*) N. W. P. v. 7, p. 7.
(*w*) Act XI of 1859, Sec. 9. See Act I of 1845, Sec. 9.
(*x*) S. D. A. 1857, p. 1195.

tenants the proportions which it was their duty to have paid. And a mortgagee, being responsible for and having paid the revenue for a whole talook, part of which was in possession of another party by whom the revenue for that part should have been paid, can recover the amount he has paid in excess of his own share, from the person who has made default (*y*).

But where a sharer had paid the Government revenue for the whole estate, and the persons in possession as co-sharers when the revenue accrued due, were afterwards found to have been wrongfully in possession, and the right as joint tenants declared by a decree of Court to be in certain other persons, it was held that the latter, who were put in possession under the decree, were not liable in respect of the revenue which had been paid for their shares, because they were not in possession when it accrued due (*z*).

A person who *bonâ fide* believed himself to be mortgagee, but who could not prove that he in fact was so (because he could not prove a power of attorney under which the instrument of mortgage purported to have been executed), paid certain sums for Government revenue in order to save the estate from sale. It was held that though he failed to establish his mortgage, the payment he had made was not a merely officious one, and that he was entitled to recover the amount from him whom he believed to be the mortgagor, and for whose benefit he had paid it (*a*).

If a mortgagee in possession allows the Government revenue to fall into arrear, with a view to the land being put up to sale and his becoming himself the purchaser of it, and he does in fact so become the purchaser of it, such a purchase gives him no absolute title. One who being in possession as mortgagee or trustee, fraudulently obtains the proprietary right, is to be treated as still in the position of trustee, as regards the person defrauded.

(*y*) See 7 W. R. p. 377 (decided by a Full Bench). See also N. W. P. v. 10, p. 1, but the case is reported almost unintelligibly.

(*z*) S. D. A. 1855, p. 44.

(*a*) 5 W. R. p. 126.

This was so ruled by the Supreme Court in a case (*b*), in which the Judges expressed their opinion in the following terms:—"We continue to hold the opinion we expressed at the hearing, that the revenue laws cannot protect such a transaction as this last: that a mortgagee in possession of an estate and registered as its owner, who properly or improperly suffers that estate to fall into arrear, cannot be allowed to purchase it at a Government sale, to the prejudice of his mortgagor, and so as to acquire an irredeemable interest in it. Upon such a purchase a Court of Equity on general principles will fasten a trust, and hold that the mortgagee, subject to the re-payment of the amount due on the mortgage, and of his expenses properly incurred, is a trustee for the mortgagor."

The rule thus laid down has been approved of and confirmed by the Privy Council (*c*): so that the law upon the subject must now be taken as finally settled.

More than fifty years after a sale for arrears of revenue, at which sale the mortgagee became the purchaser, the heirs of the mortgagor sued to recover possession on the ground that the relation of mortgagor and mortgagee still subsisted. It was held that as the sale had been unquestioned for fifty years, and as the mortgagor and his representatives if they had used ordinary diligence, could not have remained ignorant of the sale, the suit was barred (under the old law of limitation) in the absence of any special proof of fraud (*d*).

There was a mortgage in the English form, and the mortgagor remained in possession under it. Being so in possession he, for the purpose of defrauding the mort-

(*b*) *Raja Oojooderam Khan* v. *Aushootosh Dey*, Supreme Court, 6th July 1852, reported in the "Englishman" newspaper, 8th July 1852. See also *Kelsall* v. *Freeman*, "Englishman," 4th February 1854.

(*c*) *Nawab Sidhee Nazir Ali Khan* v. *Oojooderam Khan*, 10 Moore's Ind. Ap. p. 322, 5 W. R. p. 83 (P. C.)

(*d*) Marshall, p. 391.

gagee, made wilful default in the payment of Government revenue, and at the sale which was held in consequence, he himself purchased the property *benamee*. The Court was of opinion that such conduct was highly fraudulent and that the mortgagor had committed a criminal offence under section 405 of the Indian Penal Code (*e*).

It has been held that where the agreement is that the mortgagee shall remain in possession of the land until the principal and interest are paid from the profits, the mortgagee is bound to continue in possession so long as there is any thing due to him on the mortgage: at least, if he cannot shew good cause for not doing so, he will have no personal claim on the mortgagor for any part of his debt (*f*). But this is scarcely in accordance with the rule laid down by the Privy Council in an appeal from the Bombay Sudder Court. The facts there were as follows. A mortgage of the revenues of a village was executed by the firm of *Lal Kishen*: and the mortgage deed contained a stipulation that the receipts should be applied in liquidation first of interest and then of principal, and that the mortgagees "shall continue so to receive and appropriate the annual produce, until the whole of their demand be liquidated." The deed further provided that the mortgagees should station a clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors. A clerk was accordingly appointed who received the rents and profits of the village for some years, but afterwards permitted the mortgagors to receive them for four or five years. *A* was one of the partners of the firm of *Lal Kishen*, and was therefore (though he did not personally execute the mortgage deed) in the position of a mortgagor. The partnership was put an end to, and on arrangement of its affairs the mortgaged estate became the property of partners other than *A*. *A* having got a decree against his late partners for a sum of money

(*e*) 5 W. R. p. 230. (*f*) S. D. A. 1850, p. 44.

which was due to him, proceeded to enforce his claim by attaching the property. Until this attachment, the mortgagees had no notice of *A's* claims. The Privy Council held (*g*) that in effect the mortgage deed contained "merely a power (for the mortgagee) to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate." Their Lordships observed,—"If an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagor. He would have a full right to recover his debt by reason of the mortgage. The only effect would be when some subsequent incumbrancer came in and he had notice of that claim. In that case the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer: and that is the principle which their Lordships think ought to be applied to this case." Their Lordships go on to say that when *A* proceeded to enforce his claim by attachment (but not before) he became in the position of a second incumbrancer: "and therefore their Lordships are of opinion that though possession was taken by the mortgagee by means of his *mehta* (clerk), and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed on the village, he had notice of an adverse claim, and if after that time he permitted the mortgagor to receive any portion of the profits of that estate, then he ought with respect to the monies so received to be postponed to the subsequent incumbrancer. * * * * He is to be charged for about two years, during which time he permitted the mortgagors after

(*g*) *Jugjewun Das* v. *Ramdas Brijbookun Das*, 2 Moore's Ind. Ap. p. 487, 6 W. R. p. 10 (P. C.).

the attachment was placed, to receive the rents and profits of the village."

The mortgagee in possession must see to the proper management of the estate, and will be held responsible for any waste or actual damage committed or done by him, and for any deficiency in receipts arising from negligence or misconduct on his part. And a mortgagor is entitled to recover damages from his mortgagee (and also from a sub-mortgagee or any other person who has joined in the act complained of), for injury caused to the property by the acts of the mortgagee and others during the time of their being in possession (*h*). So, he may recover damages for waste committed,—as by the improper cutting down of trees (*i*). But those only are liable in damages, who have been guilty of the grievance for which redress is sought: and therefore a sub-mortgagee is not liable for damage caused before his entry (*j*).

It is the duty of the mortgagee in possession to realise balances due from the cultivators on the estate; and if these balances are lost through his negligence, they will be charged against him in taking the accounts (*k*). He must pay the wages of village chowkeedars and putwarees, and all other regular village expenses; these are altogether independent of the will of the mortgagee, and are payments which he, as representative of the owner, is compelled by the orders of Government to make (*l*).

Every mortgagee in possession is bound to keep regular and accurate accounts of all sums received and expended by him in the management and preservation of the property, and if he fails to do so, the Courts make it a rule to lean against him, and to resolve all doubtful points in favor of the mortgagor (*m*).

(*h*) N. W. P. v. 7, p. 436.
(*i*) N. W. P. v. 9, p. 1.
(*j*) N. W. P. v. 7, p. 436.
(*k*) N. W. P. v. 9, pp. 159, 371.
(*l*) N. W. P. v. 7, pp. 248, 477: v. 9, p. 371.
(*m*) N. W. P. v. 10, p. 684. See W. R. 1864, p. 177: 5 W. R. p. 271: and see *post* the Chapter on Accounting.

It has been held that a mere usufructuary mortgagee has no right to plant trees on the land held by him under mortgage (*n*).

A mortgagee of a share in a joint estate has no such right as entitles him to sue for a partition, even although the mortgagor acquiesces in his doing so. "The plaintiff has founded his claim on the fact that he stands in the same position as the mortgagor, and therefore that he is at liberty to sue for a division of the estate. The Court agree that in a measure he does stand in the position of the mortgagor, *i. e.* so far as he is entitled to hold the property in the same manner as he received it from the latter: but they consider that as he has no proprietary right in the estate, he cannot sue for a division of it, the proprietors being alone the persons contemplated by the law, Regulation XIX of 1814, who are competent to make such an application." And in such a case, the mortgagee seems to be entitled as against the mortgagor to possession only of the portion of the property mortgaged to him, but without disturbance of the title of the lumberdar and his position thereunder, and without interruption of the existing fiscal arrangements for the collection of the revenue and general management of the estate (*o*).

The proprietor of a talook mortgaged a two annas' share to B. Subsequently he sold a five annas' share of the same talook to C, with whom he made a butwara, under which a certain village was registered by the Revenue authorities in C's name, and as representing his five annas' share. The Court held that on the completion of the butwara, B lost all lien over the two annas' share of the village made over to C, and that thenceforth his lien was limited to such a share of the remainder of the talook as corresponded with a two annas' share of the whole talook as it originally stood. As there was no allegation of fraud on the part of the proprietor and C, and

(*n*) 1 Agra, p. 281. (*o*) N. W. P. v. 10, p. 453.

as the partition was executed under a butwara by the Revenue authorities, the Court was of opinion that the partition must be taken as final and conclusive (*p*).

A first mortgagee being lawfully in possession under his mortgage, a second mortgagee got (as he was entitled to get) a decree for the sale of the property, but subject to the rights of the prior mortgagee. It was held that the second mortgagee had no right, in execution of this decree, to enter on the property and take actual possession through the bailiffs of the Court or otherwise. His proper course was to issue a prohibitory order under the 235th and 239th sections of the Code of Civil Procedure (*q*).

A creditor may transfer to any third party a sum of money due to him, without previous reference to the person indebted, and without his consent. The transferee may resort to the same measures for the recovery of the amount of the debt, as the original creditor himself might have adopted had the transfer not taken place (*r*).

So there is no legal impediment whatever to the transfer by a mortgagee of his rights and interests as mortgagee, and his assignee will have in all respects the same rights and liabilities as the mortgagee himself had (*s*). But such a transfer must be without prejudice to the rights of the mortgagor. The mortgagee may put another person in his own position, but he cannot create a title in a third party, distinct from his own (*t*).

This last rule was given by the Calcutta Sudder Court as one of the grounds on which it decided that the mortgagee cannot, even in exercise of a power expressly conferred on him by the mortgage deed, sell the mortgaged property to a third person absolutely, on default being made by the mortgagor. As such a power would not enable the mortgagee himself to become absolute proprietor of the land,

(*p*) S. D. A. 1857, p. 358.

(*q*) *Mudhun Mohun Doss* v. *Gokul Doss*, 10 Moore's Ind. Ap. p. 563, 5 W. R. p. 91 (P. C.).

(*r*) N. W. P. v. 10, p. 474.

(*s*) S. D. A. 1848, p. 530.

(*t*) S. D. A. 1847, p. 354. See 8 W. R. p. 399.

it was held, that for the mortgagee to exercise such a power in favor of a third party, was to create a title distinct from his own, and therefore invalid: and that, as the mortgagee's own title was one which might be made absolute with the aid of the Courts, but not otherwise, no higher right than this could be passed by him. The title passed by the mortgagee, however, when he exercises such a power, is not in fact his own right, or any part of it. A conveyance made by him under the power, is as it were the direct act of the mortgagor, the mortgagee being only the hand by which it is made (*u*).

And the mortgagor may either transfer absolutely, or mortgage his remaining interest in lands which he has already mortgaged, without first redeeming them. The purchaser or mortgagee acquires the rights and interests of the mortgagor and stands in his place: he takes the property subject to the lien of the prior mortgagee, the liabilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor,—nothing, in fact, but a revenue sale,—can injure the mortgagee's lien on the land, or on that which represents the land (*v*).

A mortgagor, after having hypothecated or pledged certain lands by way of simple mortgage, had a settlement made which divested him, as proprietor, of all his rights, and assigned him a malikana allowance in lieu of his claims. It was contended that not only had the mortgagee no longer any claim on the land, but that the malikana allowance was not subject to his lien. But the Court held, that—"the thing pledged was not changed by the proceedings of settlement, so as to affect the mortgagee's lien, and that the pledge must be regarded as extending to any interest essentially involved in, and arising

(*u*) *Supra*, pp. 45-47.

(*v*) 4 W. R. p. 45 : 6 W. R. p. 230 : 3 W. R. p. 230. S. D. A. 1848, p. 305 : 1850, p. 77 : 1857, p. 953. N. W. P. v. 6, p. 32 : v. 7, p. 138 : v. 9, pp. 371, 421 : v. 11, p. 8. See S. D. A. 1858, p. 382.

from, the interests possessed in the property by the debtor at the time of the original transactions; and that the malikana right assigned to the mortgagor at the settlement, strictly fell within that category" (*w*).

If a first mortgagee obtains a decree against the mortgagor, and the lands are sold in execution of that decree, but do not realise more than enough to pay off the first mortgage, the auction purchaser has a title to the lands free from all incumbrances subsequent in date to the first mortgage (*x*).

The mere purchase of mortgaged property by a third party, does not render him personally liable for the debt, to secure which the land was pledged. The lien on the property under mortgage continues, and the only effect which the purchase has on the mortgagee's position, is that it gives the purchaser, as the mortgagor's "representative," the option of redemption (*y*).

It has been held that a mortgagor cannot transfer his interests, in opposition to an express stipulation to the contrary, and that a transfer made under such circumstances is *ipso facto* void, or at least voidable (*z*).

An agreement, however, in general terms, as "not to alienate any of my property until the debt has been paid," —no property in particular being mentioned,—does not constitute a mortgage; and a *bonâ fide* purchase made from the debtor is good and cannot be set aside (*a*).

But a sale within the forbidden time by a mortgagor, of property which he had pledged stipulating that during a certain period he would not sell his interest in it, was declared void and cancelled (*b*). And where there was a condition, that any alienation of the property by the mortgagor, until liquidation of the debt secured on it, should be illegal, a mortgage previous to such liquidation, was

(*w*) N. W. P. v. 8, p. 669.
(*x*) N. W. P. v. 10, p. 227.
(*y*) N. W. P. v. 8, p. 316. See S. D. A. 1857, p. 953: 1858, p. 358: 1859, p. 1181.
(*z*) N. W. P. v. 8, pp, 316, 341, 669.
(*a*) S. D. A. 1855, p. 353.
(*b*) N. W. P. v. 6, p. 39.

held to be null and void (*c*). And so, when property was pledged as a security for the honesty of the pledgor, and there was a written engagement by him not to alienate it, by gift, sale, or otherwise, till his accounts were settled, a sale made previous to such settlement, was held void as against the original pledgee (*d*).

The Agra Sudder Court laid it down distinctly in one case, that where there is an express stipulation in a mortgage deed not to alienate the property pledged, a subsequent conveyance of it by lease or otherwise, involves a violation of its terms, by creating a lien which it was the express object of the stipulation to prevent; and that the mortgagee has a good cause of action against any one who is a party to such violation, and is entitled to a distinct declaration of the invalidity of the subsequent conveyance, without reference to its consequences on the property, or to its effect upon the prior mortgage (*e*). And the same Court has also ruled that a suit may be instituted to set aside, as fraudulent, a deed of sale by which the plaintiff's title is put in jeopardy, although he has not actually been dispossessed under it (*f*).

But in many cases alienations contrary to express contract have been more leniently, and perhaps more equitably, dealt with, and considered to be bad only in so far as they interfered with the rights of those with whom the condition not to alienate was made.

An appeal was admitted, the judge being of opinion that "the condition of the mortgage (*viz.*, that the mortgagor should not alienate during its continuance), could never be intended to preclude the mortgagors transferring their own proprietary right to a third party, subject to the original mortgage. Of course, possession could not be decreed on such a transfer, until the full amount due to

(*c*) N. W. P. v. 7. p. 614.

(*d*) S. D. A. 1848, p. 682. See 1851, p. 482.

(*e*) N. W. P. v. 8, p. 341: v. 10, p. 227.

(*f*) N. W. P. v. 9, p. 517: v. 10, p. 240.

the mortgagee was paid or liquidated from the usufruct." And this view of the law was afterwards taken by the full Court and the transfer was declared to be valid, subject to the mortgagee's prior lien (*g*). So where there was an agreement "not to give a *kut* or permanent pottah," and that "if any sale &c., should be made, it should be invalid," it was held that the mere giving a mortgage by conditional sale of the land referred to, was no infringement of the contract, although if the sale were made absolute so as wholly to alienate the property, there would then be a violation of the agreement (*h*). And when in a *soolenamah* there was a stipulation in general terms not to alienate the property, a mortgage made in order to save the estate from permanent alienation was upheld. The debt for which it was mortgaged, had been incurred to save it from being sold for arrears of revenue (*i*).

There was a stipulation in a mortgage deed that until the mortgage debt was paid off, the mortgagor would not sell the property, or that if he did sell it, he should sell it to the mortgagee at a fixed price. The mortgagor subsequently executed a *hibba-bil-iwaz* giving a portion of the property to his wife in lieu of dower. The mortgagee sued to set aside the *hibba-bil-iwaz* as null and void. The Court (*j*) held that the mortgage deed merely gave the mortgagee a right of pre-emption at a fixed price in the event of a sale being made, but did not absolutely prohibit the alienation of the property,—and that the mortgagee could only sue to enforce his right of pre-emption. Not having offered to purchase, his suit was dismissed.

The Calcutta Sudder Court in its later decisions held that an express stipulation not to alienate property which is mortgaged, until the debt and costs are paid off, did not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right,

(*g*) S. D. A. 1848, p. 305. See 1854, p. 96.

(*h*) S. D. A. 1858, p. 477.

(*i*) N. W. P. v. 6, p. 227.

(*j*) 1 Agra F. B. p. 69. See 1 Agra F. B. p. 7.

or making a second mortgage, provided such transfer or mortgage were made subject to the first mortgage (*k*).

An alienation contrary to express agreement cannot be pleaded by the alienor, for the purpose of avoiding his own act. The person whose interests are prejudiced by the alienation, can alone put in such a plea or have the transaction set aside (*l*).

The plaintiffs in a suit, sought to charge certain lands with monies due to them. The lands in question had been mortgaged in 1846 to the defendants, and the equity of redemption was sold to them by the mortgagor in 1850. Prior to the sale in 1850, a prohibition against the alienation of the lands in question, was under section 5, Regulation II of 1806, issued at the instance of the plaintiffs. It was held, that the rights and interests of the mortgagor in the property attached, as they stood on the date of the issue of the prohibition against alienation, were liable to be sold by the plaintiffs in execution of the decree they had obtained for payment of the debt due to them by the mortgagor (*m*).

A mortgage executed subsequent to attachment duly made is null and void (*n*).

The fact of there being an existing mortgage over lands, in no way prevents the rights and interests of the mortgagor in them from being sold by auction in execution of a decree against him (*o*). And an execution creditor should attach those rights and interests, notwithstanding their being incumbered. If he does not do so, but remains content with a temporary arrangement such as an assignment of the rents of the estate, the mortgagor's rights may be sold and applied in satisfaction of the debt of any other decree-holder, who may afterwards come and attach them.

(*k*) S. D. A. 1856, p. 942 : 1857. p. 825.

(*l*) N. W. P. v. 10, p. 510.

(*m*) S. D. A. 1856, p. 67. See N. W. P. v. 11, p. 11.

(*n*) Act VIII of 1859 Sec. 240. See S. D. A. 1857, pp. 407, 777 : 1859, p. 102 : 9 W. R. p. 167.

(*o*) See S. D. A. 1857, p. 953: 1858, p. 498 : 1860, v. 2, p. 35.

A judgment creditor, instead of attaching the rights of his debtor as mortgagor of certain property, merely applied to the Court for an assignment of the rent payable to the debtor by the lessees of that property: and these rents were accordingly paid to him, so long as the lease lasted. Another judgment creditor had his debtor's rights as mortgagor put up for sale, in satisfaction of his decree. It was held, that the first creditor, having chosen to rest satisfied with another arrangement, and by his own laches allowed the rights of the mortgagor to get into the hands of another, had lost his remedy as against those rights, and that he had no claim, against the second judgment creditor or against the estate which had so passed into his hands under a legal title (*p*).

But only those rights and interests which remain to the mortgagor can be sold, and the sale of them in no way affects the mortgagee or his lien. A purchaser at a sale in execution of a decree takes only what the previous possessor has to give; and his acquisition is subject to all the conditions and incidents under which it was held at the date of the sale to him (*q*). A purchaser at a sale in execution of a decree is entitled to all the rents due on the date of sale, or falling due afterwards. But he cannot recover from the former proprietor arrears of revenue fallen due before the sale, which the purchaser has been obliged to pay in order to prevent the estate from being sold by Government (*r*).

An usufructuary mortgage was granted, by way of lease, two years being the term given for repayment, there being also a stipulation that, after the lapse of that time, the mortgagee might hold on, until his claim was satisfied. It was held, that until the mortgage debt was paid, the mortgagee was entitled to possession, both

(*p*) N. W. P. v. 8, p. 372.

(*q*) 9 W. R. p. 244: N. W. P. v. 9, pp. 399, 559: v. 10, p. 562: v. 11, p. 8: S. D. A. 1857, pp. 486, 953: 1858, p. 498: 1860. v. 2. p. 25.

(*r*) N. W. P. v. 9, p. 344.

before and after the expiry of the term of two years, even against a decreeholder (*s*).

When there was a stipulation that the mortgage debt should be paid off on a day named, a sale of the property in execution of a decree against the mortgagor, in no degree diminished or affected the lien of the mortgagee, who was consequently held not to be entitled to sue the mortgagor personally for the recovery of the debt, before the day fixed by the contract (*t*).

A mortgagee ought not, however, to remain quiet at the time of a sale of the mortgagor's rights and interests, but should give notice of his lien (*u*).

When a mortgagee comes forward, objecting to an auction sale, on account of his prior lien on the land, the existence of his claim should be made known by the auctioneer to the bidders.

A mortgagor impliedly warrants his title to the property mortgaged, and if the title is defective, the mortgagee can sue for damages for the breach of contract, though there be no express agreement as to title (*v*).

It is the duty of a mortgagor who has covenanted to put the mortgagee into possession, to do so at once, and to secure his quiet enjoyment of possession during the term agreed upon. And a mortgagor who refuses, or is unable to give and to secure possession to an usufructuary mortgagee, renders himself liable to an immediate action for recovery of the money advanced, with interest. This has been ruled by the Privy Council, confirming a decree of the Calcutta Sudder Court.

There was an usufructuary conditional sale: the mortgage money was not repayable until the lapse of twenty years, but the mortgagee was to have possession from the date of the mortgage. Possession was withheld, and the mortgagee sued to recover the money lent by him with intrust. It was held that the mortgagee was entitled

(*s*) 6 Sel. Rep. p. 175.
(*t*) N. W. P. v. 3, p. 209.
(*u*) N. W. P. v. 5, p. 3.
(*v*) 2 Agra, p. 199.

to recover at once, and without waiting till the end of the twenty years (*w*).

A mortgage by way of lease was granted, the condition being that the farm should continue in force until the money was repaid. Previous to payment, the mortgagor ejected the mortgagee: and the Court held that the latter might sue the mortgagor for the money, and was not restricted to a suit for possession. The mortgagor having committed a breach of contract, could not enforce fulfilment from the mortgagee of what was to be performed on his part (*x*).

In a case which has been already referred to, of mortgage by conditional sale, the mortgaged lands were, prior to the date at which the loan was repayable, sold under a decree as belonging to a third party. The mortgagor unsuccessfully asserted his rights in the summary sale proceedings, but took no further steps to protect the mortgagee. It was decided that as the mortgagor had neglected the duty which lay upon him of preserving his rights for the mortgagee, the latter was entitled to sue to recover the money he had advanced, and was not bound to enforce his claim against the land (*y*).

When the agreement was that the mortgagee should be put in possession and repay himself from the usufruct, and the mortgagor prevented his getting possession and evaded having his name registered in the Collector's books, this was held to entitle the mortgagee to sue for his money instead of for possession (*z*).

In another case the Court delivered the following judgment:—"The deed of mortgage is of the nature of mortgage with possession, being redeemable at any time, and the original mortgagee's possession having been disturbed by the act of the mortgagors which introduced the auction

(*w*) *Raja Oodit Purkash Sing* v. *Martindell*, 4 Moore's Ind. Ap. p. 444: S. D. A. 1856, p. 849: N. W. P. 1860, p. 280.

(*x*) S. D. A. 1852, p. 193: 1853 p. 59: 1858, p. 306. See S. D. A. 1859, pp. 58, 322.

(*y*) S. D. A. 1853, p. 575.

(*z*) N. W. P. p. v. 8, p. 286.

purchaser in their place, such act amounted to a wrongful dispossession, and fully justified the mortgagee in bringing his suit for the amount of the mortgage debt, it having been repeatedly held that when the mortgagor has committed a breach of contract, he cannot claim fulfilment by the mortgagee of what was to be performed on his part." What the terms of the mortgage contract in this case were, does not exactly appear from the report. But it seems to have been a simple usufructuary mortgage, for in another part of the judgment of the Court, it is said that the decree passed in favor of the mortgagee (for repayment of the mortgage debt) "does not carry a title to possession of the mortgaged property, but only a title to bring to sale the mortgagor's rights and interests in the estate whatever they may be. A declaration will suffice, that in execution the decreeholder will have liberty of bringing to sale those interests only which are mortgaged to him" (*a*).

In one case the mortgagee had possession, by deed of *burna*, in security for a loan. The terms of the deed were such that so long as the estate remained bound by the mortgage, the mortgagee could look no further than the estate and the convenience of the mortgagor for the discharge of the debt. The property was sold for arrears of Government revenue, and the mortgagee consequently lost possession. The sale for arrears left surplus proceeds which were claimed by and paid to a third party who held a decree against the mortgagor. The mortgagee then sued this third party for the surplus proceeds paid over to him, on the ground that those proceeds represented the mortgaged estate and were bound by the mortgage. But it was held that until the mortgagee obtained a decree against the mortgagor he had no more right to the surplus proceeds or other assets belonging to the mortgagor than any other ordinary creditor had (*b*). If in execution

(*a*) N. W. P. v. 11, p. 115. See S. D. A. 1859, p. 1181.

(*b*) S. D. A. 1860, v. 2. p. 38.

of a decree of Court, mortgaged lands are sold subject to a mortgage, the mortgagee is not entitled to share in any surplus (*c*).

If it is the expressed intention of the parties, that the land, and the land only, shall be the source from which the mortgagee is in any event to be paid, he must in the first instance bring his suit for possession. The terms of a mortgage deed were, that the surplus proceeds of a certain talook should be applied to the extinguishment of the mortgage debt, "and that in the event of the non-fulfilment of this condition, the mortgagee *might sue to obtain possession of the estate.*" It was held that the mortgagee could only avail himself of the remedy expressly provided for him in his deed, and must sue for possession (*d*). In another case the mortgagee, who was put in possession, was to keep a certain portion of the yearly usufruct in lieu of interest, and this he was to continue to do, until the mortgagors came forward and paid off the principal in one sum. The mortgagee, after being in possession some years, voluntarily gave it up, and brought a suit on his mortgage deed, for principal and interest. It was decided that so long as he received the specified sum from the usufruct, he had no right to complain, or to ask for his principal, until such time as the mortgagor chose to pay it off. It was, however, observed that if he had been dispossessed while any thing was yet due to him on the mortgage, he would have had a right to claim to be restored to the estate, or to sue without further delay for a cash payment, whichever he preferred (*e*).

There was apparently a pure usufructuary mortgage, the agreement being that the mortgagee should have possession until payment: but the money was not paid, nor did the mortgagee get possession. He therefore brought a suit for possession, and for the interest of his

(*c*) Act VIII of 1859, Sec. 271.

(*d*) N. W. P. v. 3, p. 18.

(*e*) N. W. P. v. 3, p. 331.

money during the time he had been kept out. The Court ruled that the conditions of the deed shewed that the mode of payment selected and stipulated for by the parties, was payment from the usufruct, and that the mortgagee's claim for interest was not in accordance with the terms of the deed, and must be rejected (*f*).

The question was raised whether a mortgagee by usufructuary conditional sale, who had never got possession of the property, could foreclose the mortgage, he having refused to accept a tender of the principal sum due, on the ground that he was also entitled to interest for the time during which the usufruct was withheld from him. The Court expressed an opinion, "that if he did not obtain the possession stipulated for, it was open to him to bring a suit to enforce fulfilment of the contract, but he was not at liberty to forego this right, and to demand interest in lieu thereof, contrary to the express terms of the contract" (*g*).

In like manner any deviation by the mortgagee from the terms of his contract, entitles the mortgagor at any time to have it cancelled and to pay off his debt.

A mortgage agreement, in the form of an usufructuary conditional sale, provided that certain arable and orchard lands, portion of the mortgaged property, should continue in the possession of the mortgagor. The mortgagee, during the continuance of the mortgage term, took possession of some of the reserved orchard lands. It was held that this was such a breach as entitled the mortgagor at once, and without waiting for the day of payment originally agreed on, to cancel the mortgage contract and recover possession of the whole mortgaged property, on paying into Court the full amount of the loan. And his right to do so, was not affected by the fact that it was not expressly given to him by the mortgage deed (*h*).

(*f*) N. W. P. v. 3, p. 211.
(*g*) N. W. P. v. 8, p. 441.
(*h*) N. W. P. v. 10, p. 223.

There are several cases which are remarkable as showing that a mortgage may be in abeyance for a time, without its validity being affected. Thus, where the mortgage is of an usufructuary nature, and the Collector comes in and farms the land, not on account of any fault or mismanagement on the part of the mortgagee, the mortgage is, as respects the land, in abeyance during the Collector's possession, but will revive in full force when he gives it up again (*i*). So if a mortgagee purchases the remaining rights of the mortgagor, and his purchase is set aside on the ground of the mortgagor having previously disposed of those rights, the mortgagee's title as mortgagee will revive in full force (*j*).

As the holder of a zur-i-peshgee lease has rights equivalent to those of a mortgagee, he has such "an interest" in the lands leased, that if execution be issued against that "interest," it must be sold according to the rules prescribed for the sale of realty, not according to those laid down for the sale of personalty (*k*).

It has been said, but not actually decided, that if *A* has a mortgage upon two different estates for the same debt, and *B* has a mortgage upon only one of the estates for another debt, *B* has a right to throw *A*, in the first instance, for satisfaction upon the security which *B* cannot touch,—at least where it will not prejudice *A*'s rights or improperly control his remedies (*l*).

(*i*) N. W. P. v. 7, p. 7 : v. 8, p. 59 : v. 10, p. 553.
(*j*) N. W. P. v. 9, p. 183.
(*k*) S. D. A. 1861, v. 1. p. 97.
(*l*) 7 W. R. p. 483. See Story's Equity Jurisprudence, § § 633, 642, 643.

CHAPTER VIII.

OF REDEMPTION.

The mortgagor, his heirs, and assignees to whom he has transferred his interest, are entitled to redeem a mortgage. But the right to do so, exists only up to the time of the lands being sold under decree of Court in satisfaction of the mortgagee's claim, or, where the mortgage is by way of conditional sale, until the lapse of one year from the date of issue of a notice from the mortgagee, calling on the mortgagor or his representative to pay off the debt or to be foreclosed. And redemption can never take place, until a sum equal to the amount of the principal monies advanced, with interest at the rate that may be stipulated for, or if no rate has been stipulated for, at twelve per cent., has been received by, or tendered to the mortgagee. If the contract was entered into before Act XXVIII of 1855 came into force, it is not in any case necessary to pay or tender interest at a higher rate than twelve per cent. per annum.

The payment to the mortgagee of what is due to him, must come either from the usufruct of the property pledged, or from some of those persons in whom the right of redemption is vested: for the interest of the mortgagee in the land is inferior only to that of the mortgagor and his representatives, and if they do not redeem, the mortgagee need not allow any one else to do so. A mortgagee, therefore, is not bound to receive payment of the sum

due to him, or to relinquish his lien, without having proof that the party offering to redeem is entitled to insist upon his right to do so. And he may put any one who claims the right, to proof of his title, not being obliged to give up his mortgage tenure to a stranger. Thus, a person claiming to redeem on the ground of inheritance from the mortgagor, must prove that he really is the heir of the mortgagor, before he can succeed in his suit (*m*). "The mortgagee is not bound to *any* person who may start up with the allegation that he has succeeded to the rights of the original mortgagor. On the contrary, it is his duty as trustee for the mortgagor, to take the same care of the estate as he would of his own, and to admit no claims upon it until assured of the title of the claimant" (*n*).

And if the mortgagee rejects the tender of one not entitled to redeem, the mortgagor cannot afterwards claim any benefit from such tender, unless it was expressly made on his account.

A creditor having obtained a decree against his debtor, wished to put it in force by attaching and selling certain lands belonging to the latter. But the lands were in the possession of a mortgagee by conditional sale, and could not be attached. The decreeholder then deposited in Court what was due on the mortgage, and brought a suit for redemption, in which he was unsuccessful as it was held that he had no title to redeem. The mortgagor himself afterwards brought a suit for redemption, on the ground that the right to redeem (which would otherwise have been barred), had been kept alive by the money having been tendered by the decreeholder. The Court was of opinion, that the money so deposited, could not be considered to be the money of the mortgagor, it not having been deposited on his account, or for his benefit in any way. It was not deposited with a view to save his estate from the conditional sale, but with the view of bringing

(*m*) N. W. P. v. 7, p. 45 : 1860, p. 120.

(*n*) S. D. A. 1859, p. 1273.

it to an absolute sale by public auction, in satisfaction of the claims of the depositing party (*o*).

In this case, however, the deposit, if it had been made in the mortgagor's name or with his consent, would have been good, both as entitling the creditor to redeem, and as keeping alive the right of the mortgagor himself to do so. It would then have been the act of the mortgagor himself.

Persons to whom the mortgagor has transferred his whole interest, that is to say, purchasers *out and out* of his equity of redemption, are entitled to redeem (*p*). It was however, apparently not so held formerly (*q*).

If a purchaser of the mortgagor's equity of redemption makes default in paying the purchase money or any portion of it, this does not necessarily invalidate the sale. In a suit brought by the purchaser to redeem, the mortgagee cannot avail himself of the objection that the full amount of the purchase money has not been paid, since his only right is to be satisfied that the person seeking to redeem is not a stranger, but one to whom the equity of redemption has been transferred by a *bonâ fide* sale (*r*).

A mortgagee by conditional sale can redeem one who has a prior simple mortgage of the same property (*s*). And where there was a simple mortgage and a subsequent mortgage by conditional sale, the first mortgagee having got a decree and having sold the property in execution, the Court held that the second mortgagee could have redeemed the first, and that not having done so, but having allowed the estate to be sold to satisfy the first mortgage,

(*o*) 3 Sel. Rep. p. 54.

(*p*) 6 W. R. p. 230 : 3 W. R. p. 230 : 4 Agra, p. 30 : S. D. A. 1853, p. 859 : N. W. P. v. 9, pp. 371, 421. In N. W. P. v. 8, pp. 181, 316 : v. 9, p. 1 : v. 10 p. 51, the right of the purchaser of the equity of redemption is tacitly admitted. So in S. D. A. 1854, p. 1 : 1859, p. 127.

(*q*) S. D. A. 1847, p. 499 : N. W. P. v. 6, p. 210.

(*r*) 4 Agra, p. 30.

(*s*) S. D. A. 1848, p. 305 : 1859, p. 1567 : 4 W. R. p. 45.

he had no claim as against the purchasers at the sale, and could not follow the lands in their hands (*t*).

The Agra Sudder Court held that no subsequent mortgagee has a right of redemption enabling him to redeem a prior mortgagee by conditional sale. The Court said that "the parties to a mortgage contract are mutually bound by their engagements to each other; and as the first mortgagee's contract was with his mortgagor, and with him only, or with his legal representatives in which light the second mortgagee cannot be viewed, it is not competent to any third party to claim, or to the Courts to compel, a surrender of the tenure in whole or part, for which the first mortgagee is only answerable to the persons from whom he received it, by payment of the amount of the mortgage loan. It equally follows, that the mortgagor is not at liberty to devolve the right of redemption to a third person, not a legal representative" (*u*). And the Calcutta Sudder Court appears to have come indirectly to the same conclusion (*v*).

But these decisions have been practically over-ruled (*w*). In a case in which there was a zur-i-peshgee lease for nine years, with a condition against alienation, and after the nine years had expired a second zur-i-peshgee lease was granted by the mortgagor to a third party,—it was held by the Agra High Court that the latter could sue to redeem the first lessee (*x*). "The nature of the original transaction was not such as to entitle the lender to say that the borrower was (and this even after the expiration of the lease) prohibited from dealing in good faith with a third person for the means of discharging the prior incumbrance: and if the new lease was made on the security of the land, (whether the security contracted for was like the former

(*t*) S. D. A. 1859, p. 1567: 4 W. R. p. 45. See Marsh. p. 191.

(*u*) N. W. P. v. 8, p. 304.

(*v*) S. D. A. 1853, p. 859: 1856, p. 948.

(*w*) 3 W. R. p. 230. See 6 W R. p. 230: Sev. 1863, p. 573: 1 Agra F. B. p. 7.

(*x*) 1 Agra F. B. p. 7.

for a term of years, or of a higher nature) the transaction conferred such an interest in the land on the lender, as to entitle him to occupy the mortgagor's place for the purpose of maintaining a suit to redeem. To hold otherwise would lead in many cases to the infliction of grievous hardship on the mortgagor; for he may have been compelled to mortgage his estate at a time when the rate of interest was high, and subsequently be enabled to obtain a loan on easier terms; while the first mortgagee receiving his principal and interest in full, and having, as in the present case, been in possession during the whole term originally bargained for, would have received all that he could under any shadow of pretext lay claim to. The decisions in those cases where the mortgage was by conditional sale as to the persons who are properly to be deemed the 'legal representatives' of the mortgagor within the meaning of the Regulation, do not apply to a case like the present, even assuming that those decisions are not to be questioned. The lender has never dealt for any interest in the estate (beyond that which has already expired) save merely for the purpose of securing the repayment of the loan; if he is allowed to retain possession, until he is fully repaid, he will have received all that he contracted for; and if he obtains this, we think he cannot justly be allowed to object, that the person who seeks to redeem the property is not the borrower himself, but one who has acquired from the borrower an interest in the property sufficient, as we hold it to be, to authorize redemption. The reasoning in the cases quoted, and especially in the earliest case (15th May, 1853) is not satisfactory to us. The mortgage contract is there regarded as a contract strictly personal, between the mortgagor and the mortgagee, or at any rate personal to this extent, that the latter may object to the intervention of any third person unless such person fully represent the mortgagor by reason of his having acquired the whole remaining proprietary right and interest of the mortgagor in the land. Viewed as

a security for obtaining the repayment of a loan, the mortgage contract appears to confer no such right on the mortgagee, nor does it incapacitate the mortgagor from any other dealing (except in defeasance of the rights of the mortgagee) with the property."

To hold that a subsequent mortgagee has not the right of redeeming a prior mortgage by conditional sale, is in direct opposition to the principle which is the basis of the rule that a purchaser of the mortgagor's whole interest, has the same right of redemption that his vendor had. The estates of a mortgagee and of an absolute purchaser are alike, only that of the former is subject to be divested on the happening of certain events. A mortgagee is, in fact, the purchaser of the rights of the mortgagor: he buys them, but gives the mortgagor the chance of re-purchasing within a certain period. In England and in America, it has always been held that every person being a subsequent incumbrancer, or having a legal or equitable lien on premises already subject to a mortgage, may insist on a right to redeem on payment of the principal, interest, and costs due to the party redeemed, he who redeems being himself liable to be redeemed by those below him (*y*).

The refusal to recognise the right of a subsequent incumbrancer to redeem a prior mortgagee by conditional sale, probably arose from the principle being lost sight of, that the mortgage is merely a security for the debt and collateral to it, and that if the debt is paid by one who has an equity over the land, the mortgagee has got all that he had a right to, or that it was ever intended he should have(*z*). The transaction was treated by the Courts as one of absolute purchase to take effect on a certain day, but liable to become void in the event of payment by the mortgagor before that day. It was in fact dealt with as it was in olden times by the English Courts, before the present

(*y*) Spence's Equity Jurisprudence, v. 2, p. 665 : Story's Equity Pleading, ss. 185, 186, pp. 231, 232.

(*z*) See *Hunoomanpersaud Panday's* case, 6 Moore's Ind. Ap. 393.

system of equity sprung up. The terms of the contract were followed literally; and as they contained no agreement for the re-payment to the mortgagee of the money advanced by him, it was considered that he looked to be repaid by getting possession of the property pledged, and by that alone, and that he was entitled to the possession, except in the one event of the mortgagor paying him off strictly in the mode agreed upon.

A third party to whom the right has been expressly reserved in the mortgage deed, is entitled to redeem, as the mortgagor himself might have done (*a*). And it appears doubtful whether or not, on the right so reserved being exercised, the property will pass absolutely from the mortgagor to the person so redeeming, or whether the latter will be treated merely as a trustee for the mortgagor (*b*).

But a person may by his own acts deprive himself of the right to redeem. A mortgagor presented a petition in Court, stating that he was unable to pay off his debt, and that he had put the mortgagee in possession as on foreclosure. The Court seems to have been of opinion that he was estopped by this proceeding, from afterwards redeeming; but that unless delivery of possession to the mortgagee were proved, there was nothing in what had passed to bar the right of one claiming under an absolute purchase from the mortgagor (*c*).

A mortgagor is not entitled to redeem any portion of the property pledged without the whole debt being paid off. A mortgage transaction is one and indivisible, and the mortgagee has a lien over the whole estate, until the whole amount due to him has been paid.

Four villages were together mortgaged for a certain sum: the interest of the mortgagor in two of them was afterwards sold, and the purchaser sued to redeem these two, on payment of what he considered to be the propor-

(*a*) N. W. P. v. 3, p. 187.

(*b*) See Spence's Equity Jurisprudence, v. 2, p. 664.

(*c*) S. D. A. 1849, p. 311.

tion of the advance secured upon them. It was held, that the charge on the four villages could not be broken up, and that the mortgagee had a lien on the two, as on the four, for the whole mortgage debt (*d*).

Two mouzahs, each bearing a separate jumma were mortgaged, as a security for an advance of 2,000 rupees. The mortgagor then applied to the Revenue office for change of registry on behalf of the mortgagee, representing each mouzah to have been pledged for 1,000 rupees. Separate applications were necessary for each mouzah, by reason of their bearing separate jummas in the books. A few days afterwards, the mortgagee applied for registration in the usual form, making no mention of there being any separate advance or lien on *each* mouzah. The Collector, however, issued the usual notification in conformity with the specification of the mortgagor. But the Court nevertheless held that, as the deed conveyed a lien on both mouzahs for the entire loan, neither of them could be redeemed without payment of the whole of the debt (*e*). So when the rights of the mortgagor had passed to two persons in certain shares, it was held that neither of these persons was entitled to redeem without paying off the whole debt (*f*).

These decisions are apparently sound and good (*g*). There is, however, an old case reported (*h*) which is directly opposed to them.

A mortgagor may redeem part of the property pledged, if the debt for which the whole was mortgaged has been satisfied. Two mouzahs were mortgaged as security for one sum, and the equity of redemption in one of these mouzahs was afterwards sold. The purchaser was held to be entitled to sue to redeem the mouzah he had bought,

(*d*) S. D. A. 1851, p. 288: 1859, p. 823.

(*e*) N. W. P. v. 8, p. 473.

(*f*) 6 W. R. p. 240. See also 3 W. R. p. 4 (Misc.) and 7 W. R. p. 314.

(*g*) See Spence's Equity Jurisprudence, v. 2, p. 666.

(*h*) 4 Sel. Rep. p. 32.

on the ground that the whole mortgage debt had been paid off from the usufruct of the two: and this, although the other mouzah had several years before been sold by the mortgagor to the mortgagee (*i*).

Where the mortgage deed had been executed by a minor and by his mother, who joined as guardian, although the fact of her joining in that capacity did not appear on the deed, it was held that the son, on coming of age, could sue alone to redeem, without making his mother a defendant (*j*).

When two or more persons, being co-sharers, join in making a common mortgage, any one of them may redeem the property mortgaged, on payment of the whole sum due. And so may the purchaser of the rights of one of several such mortgagors (*k*).

A mortgage debt being indivisible, as already observed, no one or more of several common mortgagors, nor the purchaser from any of them, is entitled to redeem until the whole mortgage debt is paid (*l*). The mortgagor who comes forward and redeems, obtains possession of the whole property, leaving it to the co-mortgagors who do not join in redeeming, to recover their shares from him, on paying their proportion of the mortgage debt and of the expenses incurred in redeeming (*m*). The joint mortgagors who redeem, have a lien on the property for the costs they have incurred in redeeming and getting possession. And there is no need for them to institute a suit to establish that lien (*n*).

Sixteen villages were mortgaged. The mortgagor afterwards sold the equity of redemption in twelve of them

(*i*) N. W. P. v. 10, p. 51: 1 Agra, pp. 3, 36: 4 Agra, p. 33.

(*j*) N. W. P. v. 9, p. 525.

(*k*) 2 W. R. p. 150: 7 W. R. p. 314: 1 Agra p. 36: N. W. P. v. 6; p. 328: v. 1, p. 81; and the cases in note (*m*) *infra*.

(*l*) 3 W. R. p. 4 (Misc.): S. D. A. 1858, p. 1460: 1860. v. 1, p. 482: N. W. P. 1860, p. 84.

(*m*) Sel. Rep. v. 3, p. 159: v. 7, p. 53: N. W. P. v. 8, pp. 481, 518; v. 9. pp. 525, 543; v. 10, p. 378; v. 11, p. 77.

(*n*) N. W. P. v. 11, p. 77.

to the mortgagee, and in one of them to a third party. It was held that the third party was entitled to redeem the one village purchased by him and the three villages which were not included in the mortgagee's purchase (*o*).

So when two mouzahs were mortgaged together, and the equity of redemption in one was subsequently sold in execution of a decree held by a stranger, and was purchased by the mortgagee, and the equity of redemption in the other was in like manner sold under another decree and purchased by a third party, it was held that the latter might redeem the property he had purchased on paying a proportionate part of the mortgage debt (*p*). The Court said:—"A mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's interest, that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee who has acquired, by purchase, a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it."

When a sharer in a property mortgages not only his own share, but that of a co-sharer without his consent, the latter should sue to have the mortgage set aside, so far as it regards his share. He ought not to sue to redeem; for by so doing, he admits that there is a valid mortgage of his share (*q*).

But although when a mortgage of an entire estate has been executed by several proprietors in one and the same transaction, an action by one proprietor to redeem his own peculiar share on paying his proportion of the loan, will

(*o*) 1 Agra, p. 3. See 1 Agra, p. 125.

(*p*) 2 Agra, p. 88.

(*q*) N. W. P. v. 9, p. 543.

generally not lie, yet it has been said that this rule is not without exception, and cases may occur, in which, for special reasons, its enforcement may not be considered proper. And in one case it was held that the objection must be specially pleaded by the mortgagee in the first instance, and would not be entertained if not advanced until the case was in appeal, as the Courts would not take up an objection *suo motu*, except when it appeared on the face of the proceedings that some positive law had been infringed, in which case, and in which alone, it was their duty to interfere (*r*).

The rule that one of several common mortgagors may redeem the whole estate, and that he cannot redeem his own share *only*, does not apply, when it appears clearly on the face of the mortgage deed that the mortgagors have each of them separate and distinct shares in the mortgage. In such a case they have no claim on the mortgagee beyond the interests which they have themselves recorded, and it would seem that each mortgagor must redeem his own share, and that there can be no success in a suit to redeem the whole property, unless all the parties to the contract join in it (*s*).

There can be no redemption after foreclosure has taken place; for on foreclosure all the rights which the mortgagor had in the property pledged cease. And a suit for redemption instituted after foreclosure has been completed must fail, except when the foreclosure is successfully impeached and set aside.

A mortgagee executed an agreement to the effect that, if the mortgagor would consent to his obtaining a decree for foreclosure, he would afterwards restore the estate to him on certain conditions. He then brought a foreclosure suit, and the mortgagor allowed a decree to pass in his favor. But the mortgagor afterwards instituted a suit to redeem, as the mortgagee refused to fulfil his contract.

(*r*) N. W. P. v. 8, p. 591. v. 9, p. 543 : v. 10, p. 378 : 7 W. R. p. 314. See 7 Sel. Rep. p. 53.

(*s*) N. W. P. v. 5, p. 220 :

The Court held that his suit must be dismissed. "If the mortgagor were minded to enforce any agreement whatever with respect to his property, it was indispensably necessary that he should have done so, before suffering the property to pass absolutely away from him. Having suppressed his agreement during the suit for foreclosure, he is not in a position to prefer any legal or equitable claim to benefit therefrom" (*t*). In such a case, however, if the mortgagor could prove distinct fraud on the part of the mortgagee he would doubtless be able to get the foreclosure set aside upon that ground.

It may happen that a mortgagee in possession is entitled to possession in more characters than one,—that he has some other title, as well as that of mortgagee. In such a case a suit for redemption will not lie.

A sum of money having been advanced for the payment of arrears of Government revenue due on a certain *puttee*, the lender was put in possession for five years as mortgagee. At the end of that period, a further sum was due for arrears, which the mortgagee paid up, obtaining a further mortgage for ten years. About the time when this second lease was granted, the Revenue officers were making a new settlement of the district, and they made it in respect of the mortgaged *puttee*, with the mortgagee and not with the mortgagor, the settlement being renewed with the mortgagee as farmer of the *puttee* for twenty years. A suit for redemption and recovery of possession was brought by the mortgagor, at the date named as the end of the second lease, but it was held that, as the mortgagee then claimed, not as mortgagee but as farmer under the settlement, a suit for redemption would not lie until the termination of his farm: the settlement, if bad, must first be set aside (*u*).

So, A holding at the time a farming lease from the Government of B's lands, advanced a sum of money to him, and received as security for the debt, a mortgage of

(*t*) N. W. P. v. 5, p. 294. (*u*) N. W. P. v. 6, p. 176.

the same property. By the terms of the mortgage contract, A was to have immediate possession and registry, and B was declared entitled to redeem after the expiration of ten years. At the close of that period, B sued to redeem and for possession; but he failed, on the ground that A was in, not as mortgagee, but as Government lessee (*v*).

The mere settlement of a resumed *maafee* estate with the mortgagee, does not destroy the mortgagor's right to redeem, nor does it necessarily make the holding by the mortgagee a holding adverse to the mortgagor's right (*w*).

Under the old law of limitation a mortgagor was never barred by mere lapse of time, from recovering his property, whether real or personal. The rule that suits were cognizable only within twelve years from the time when the cause of action arose, was applicable only when the possession of the occupant had been under a title *bonâ fide* believed to have conveyed a right of property to the possessor,—which the possession of a mortgagee never can be. The words of the old Regulation, which is applicable to deposits or pledges of money or other personal property, as well as to land, are:— "Provided that no length of time shall be considered to establish a prescriptive right of property, or to bar the cognizance of a suit for the recovery of property, in cases of mortgage or deposit, wherein the occupant of the land or other property may have acquired or held possession thereof as mortgagee or depository only, without any proprietary right: nor in any other case whatever, wherein the possession of the actual occupant, or of those from whom his occupancy may have been derived, shall not have been under a title *bonâ fide* believed to have conveyed a right of property to the possessor" (*x*). So that mere efflux of time would not, under

(*v*) N. W. P. v. 8, p. 59.

(*w*) 1 Agra, p. 224. See 1 Agra pp. 15, 231.

(*x*) Reg. II. 1805, Sec. 3, cl. 4.

the old law, of itself bar the right to redeem a mortgage (*y*).

And therefore, when, after a lapse of many years, the representative of the mortgagor sued to redeem, the fact that neither he, nor his father, nor his grandfather, all of whom in turn represented the original mortgagor, were ever in possession of the property, was held to be no ground of objection to his succeeding in his claim (*z*). But this rule, of course, applied only to the right to redeem the land, not to the right to recover mesne profits, or profits come to the mortgagee's hands after the mortgage debt had been liquidated in full, and when the mortgagor might have had himself put in possession if he had chosen. And if, after the mortgage debt had been in fact paid off from the usufruct of the land, the mortgagor waited more than twelve years before advancing his claim to possession, he was not allowed wasilat, or mesne profits, except for the twelve years immediately preceding the institution of his suit,—in like manner as under similar circumstances, he could not claim the amount due on a bond, or the rent accrued on land (*a*).

It was only in a *mere* redemption suit that the mortgagor had the benefit of this exception to the ordinary rule of limitation. When a suit was brought to set aside a mortgage deed, it being denied by the alleged mortgagor that he ever gave a mortgage at all, the case was held not to come within the exception (*b*). And when a party had been admitted by the Revenue authorities to a settlement as proprietor under a *birt* title, it was held that a suit to redeem the land, on the ground that the title of the person so admitted to the settlement was really only that

(*y*) W. R. Sp. p. 37 : Sel. Rep. v. 1, p. 185 : v. 2. p. 4 : S. D. A. 1853, p. 975 : 1854, p. 400 : 1859, pp. 1135, 1273 : N. W. P. v. 6, p. 203. 2 Madras, p. 382.

(*z*) N. W. P. v. 3, p. 187. See W. R. 1864, p. 68.

(*a*) N. W. P. v. 4, p. 298. Sel. Rep. v. 6, p. 261 : v. 7, p. 182.

(*b*) S. D. A. 1859, p. 304 : and see p. 1273.

of mortgagee, must be brought within twelve years from the date of the order of the Revenue officers. The Court was unanimously of opinion, that the plaintiff's (the alleged mortgagor's) cause of action arose with the order of the Settlement officers, which rejected the claim then put forward by the plaintiff as proprietor and mortgagor, and admitted his opponent to settlement as proprietor: and that, as the intermediate occupancy of the latter, which had extended over a period of more than twelve years, had been under a *bonâ fide* title (*i. e.* under the order of the Revenue officers) which conveyed a right of property to the possessor, the case could not be considered as falling within the cases which are excepted by Clause 4 of Section 3, of Reg. II 1805, from the operation of the ordinary rule of limitation; and the claim of the plaintiff having consequently become extinguished by lapse of time, under the general rule, he was no longer in a position to contest the title of the defendant, or to put him to the proof as to whether the possession held prior to the date of settlement, was of the nature of a mortgage or otherwise (*c*).

So where the original possession was admitted to have been as of mortgagees, but the mortgagees had at the settlement been entered on the register as zemindars, without any assertion of title on the part of the mortgagors, it was held that a redemption suit brought more than twelve years after such settlement, was barred: that it was in fact not a redemption suit, but a suit to reverse the settlement, which could not be reversed after such a lapse of time. And the Court expressed an opinion that the defendants' title was a *bonâ fide* one. "Whatever inferior interest may have been vested in them as mortgagees, previously to such settlement, became virtually superseded and extinguished, not indeed by the lapse of time, but by the new and superior right conferred on the defendants by the settlement concluded with them as zemindars, and the character of their tenure having been

(*c*) N. W. P. v. 8, p, 136.

thus altered by a specific act, the plaintiff's cause of action is rightly held to arise from the date of such act" (*d*).

The soundness of the principles enunciated in these last two cases, is questionable (*e*). And it has been held that when a settlement of rent-free land was made with a mere mortgagee in his character of mortgagee, his possession, under the settlement, was not adverse to the mortgagors (*f*).

All suits instituted on or after the first of January 1862 come under the new law of limitation (*g*).

Act XIV of 1859 enacts (*h*) that suits against a mortgagee for the recovery of any property moveable or immoveable, must be brought,—if the property be moveable, within thirty years from the time of the mortgage,—and if the property be immoveable, within sixty years. If in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given in writing signed by the mortgagee or some person claiming under him, the period of limitation will count from the date of such acknowledgment in writing (*i*). But except in the one case of a written acknowledgment of the mortgagor's title or right of redemption, it will always count from the date of the mortgage. An acknowledgment may be sufficient though made to a third party not the person entitled to the land. In one case (*j*) the Court said,—"We are of opinion that an acknowledgment of title may be sufficient within the above clause (cl. 15, sec. 1, Act XIV of 1859), although it is not made to the person entitled to the land. After the prescribed period has elapsed, the mortgagor loses all his remedy by suit, and the mortgagee consequently holds the land free from all rights of suit by the mortgagor. But if before the expiration of the appointed time, the mortgagee makes known that he holds

(*d*) N. W. P. v. 10, p. 443.
(*e*) See W. R. Sp. p. 37.
(*f*) 1 Agra, p. 15. See Agra, v. 1. p. 231 : v. 2. p. 8.
(*g*) Act XIV of 1859.
(*h*) Sec. 1. cl. 15.
(*i*) Act XIV. of 1859, Sec. 1, cl. 15.
(*j*) 3 W. R. p. 3. But compare 2 Ind. Jur. N. S. p. 180, and 2 Hyde, p. 14.

the land as mortgagee, or in other words, in a character incompatible with the notion that he is himself the owner, and if he makes this manifest by a writing acknowledging the title of the owner the mortgagor, we find nothing in the law to require that such written acknowledgment should be addressed to the mortgagor. It appears to us that a public written acknowledgment of the mortgagor's title, or an acknowledgment such as that now before us, contained in a writing addressed to a third person, if signed by the mortgagee, satisfies the requirements of the law."

The terms of clause 5, section 1, Act XIV of 1859, relate only to suits for the recovery of the property. Where a mortgagor, after the mortgage hasbeen satisfied, sues for surplus collections received by the mortgagee, the suit is governed by the six years' rule of limitation prescribed by clause 16 of section 1: for after the mortgage has been satisfied, the mortgagee cannot be considered to be in the position of a trustee for the mortgagor, within the meaning of section 2,—as against whom a suit would not be barred by any lapse of time (*k*).

When a mortgagee has endeavoured by litigation to establish an absolute title in himself inconsistent with the mortgage, and has failed, and remains in possession under the decision of a competent Court on the title which he had sought by litigation to improve into absolute ownership, his possession during the litigation, although extending over a period of more than twelve years, cannot be deemed adverse to the mortgagor, and a suit by the latter to redeem is governed by the rule of limitation provided in clause 15 of section 1.

This was so decided in a case in which the Madras High Court observed that the period prescribed for suits against a mortgagee for recovery of immoveable property, is sixty years,—and this apparently without reference to the nature of the title which the mortgagee in possession may assert.

(*k*) 9 W. R. p. 187, decided by a Full Bench.

The period can be extended only by an acknowledgment, of the character provided by clause 15 of section 1, and by no process whatever can it be abridged (*l*).

Clause 15 does not, however, apply when the relationship of mortgagor and mortgagee has been materially altered, or has ceased to exist. Thus when notice of foreclosure has once been duly issued, the suit of the mortgagor seeking to redeem on the ground that the mortgage debt was paid off before the end of the year of grace, must be brought within twelve years from the expiry of the year of grace (*m*).

A mortgagee in possession who purchased the mortgaged property at an auction sale for arrears of revenue, which sale was not caused by any fraud or misconduct on the part of the mortgagee, was held to have acquired a new title, so that if the mortgagor desired to dispute it, it was necessary for him to institute his suit within twelve years from the sale (*n*).

The guardian of certain minors having mortgaged an estate belonging to them and put the mortgagee in possession, subsequently sold the estate out and out to the mortgagee. On a suit being brought by the minors to set aside the sale as not binding upon them, it was held that a separate and distinct cause of action accrued on the sale, and that limitation was not to be reckoned from the date of the mortgage (*o*).

When a decree for redemption is obtained but is not executed within the three years prescribed, by section 20 of Act XIV of 1859, for the execution of decrees, a fresh suit for possession on redemption will lie. The mortgagee does not cease to be a mere mortgagee, simply because the mortgagor omits to execute his first decree (*p*).

In suits for the recovery from the purchaser, or any person claiming under him, of any property purchased *bonâ fide* and for valuable consideration from a trustee or mortgagee, the cause of action arises at the date of the

(*l*) 3 Madras, p. 137.

(*m*) 8 W. R. p. 476. See S. D. A. 1854, p. 137 : 1859, p. 1494 : 1861, v. 1, p. 8 : and *post*, p. 144, 145.

(*n*) 2 Hay, p. 475. But see *ante*, pp. 85, 86, as to such cases.

(*o*) 1 Agra, p. 180.

(*p*) 2 Agra, p. 256.

purchase, and the suit must be instituted within twelve years from that date (*q*) : but in the case of a purchaser from a mortgagee the suit must be brought within the time limited for the bringing of a suit against the mortgagee himself for the recovery of the property as well as within twelve years from the date of the purchase (*r*).

The manner in which redemption is carried out, varies according to the nature of the mortgage. But in all cases, the redemption is complete, on the payment or tender to the mortgagee, or the deposit in Court, so long as the right of redemption is in existence, of the sum on payment of which the mortgage is by the contract declared to be redeemable.

A mortgage deed provided that certain lands should remain in the possession of the mortgagee until the principal sum lent, should be paid down. The mortgagee having entered on possession and collected an amount equal to the principal (without any interest) the mortgagor sued to redeem, contending that as the deed was silent on the subject of interest, the mortgagee had got all that he was entitled to. It was held that he was not in a position to redeem, and in delivering judgment, the Court said,—"We find that the lands were by the deed to remain in possession of the mortgagee until the principal sum lent should be paid down. This, therefore, in our opinion, clearly implies that the usufruct was intended in lieu of interest, and the land redeemable on payment of the money lent. A mortgagor is under the law entitled to recover possession when the debt is satisfied, principal and legal interest, from the usufruct, or the mortgaged lands can be redeemed by deposit of the principal, and an account taken afterwards of the receipts during the mortgagee's possession. The special appellant in this case (the mortgagor) has not become entitled under either of these conditions" (*s*).

A mortgage deed, and a separate deed relating to the

(*q*) Act XIV of 1859, Sec. 1, cl. 12.

(*r*) *Ibid*, Sec. 5.

(*s*) 2 Hay, p. 150.

same transaction, contained stipulations for the annual payment to the mortgagor by the mortgagee, who was to have possession, of a certain sum for *nankar* and *seer*. The mortgagor sued to redeem, and stated in his plaint that he meant to bring a separate suit for arrears of the *nankar* and *seer*. It was ruled, that he was not obliged to include his claim for these arrears in the redemption suit, and that there was no such splitting of demands, as rendered him liable to a nonsuit (*t*). In another case it was held that the mortgagor was right in including a claim for arrears of *nankar* in a redemption suit, in which a general account was demanded (*u*).

A mortgagee got possession of certain lands not included in his mortgage. The mortgagor afterwards sued to redeem, not mentioning these lands. He then brought another suit for possession of them: and it was held that this was no splitting of claims, and that the cause of action was not *one* (*v*).

A mortgagee having fraudulently excluded part of the mortgaged property from the rent roll, and entered it as rent-free, the mortgagor rightly included in his redemption suit, a prayer that this might be corrected, and that the mortgagee might be charged with the rent which ought not to have been relinquished (*w*).

In a redemption suit, the mortgagee kept back the original mortgage deed, and produced one which turned out to be a forgery. It was held that the Court should have gone on with the case, and decided it upon secondary evidence produced by the mortgagor of what the terms of the contract were (*x*).

The tender or deposit must be of money, and the lender is not bound to accept of a *teep*, bond, or bill, instead of cash. However, if he does accept such a mode of payment, he cannot afterwards repudiate his acceptance.

(*t*) N. W. P. v. 9, p. 465.
(*u*) N. W. P. v. 9, p. 522.
(*v*) N. W. P. v. 9, p. 425.
(*w*) N. W. P. v. 9, p. 525.
(*x*) N. W. P. v. 10, p. 69.

But a strict compliance with the terms of his agreement, is all that is required of the mortgagor (*y*). Therefore, a tender or deposit not made in cash, is good, if it was the intention of the parties, at the time of contracting, that a payment or tender so made should be sufficient. Where it appeared to be in accordance with the original intention of the parties, certain sums due from the mortgagee were allowed to be deducted by the mortgagor from his debt, and a tender of Company's paper the nominal value of which amounted to the debt so reduced, was held a sufficient tender, without reference to the selling price of the paper. "The mortgagors have shown to the satisfaction of the Court, that they offered to pay all that was justly due at the date of making the tender, and in the mode contemplated by the lender, and they are therefore entitled" to a decree (*z*).

So, when the mortgage deed stipulates that the mortgagor shall be entitled to redeem on paying the principal, a tender of the principal alone is sufficient. And it has been said that any claim which the mortgagee may have for interest, or for other matters arising out of the mortgage transaction, must be enforced by him in a separate suit against the mortgagor, and that the mortgagee cannot, on the ground of any such claim, oppose the mortgagor's right of redemption (*a*).

Lands were mortgaged as being *lakhiraj* and the mortgagee was put in possession, the agreement being that the profits should be taken in lieu of interest. Subsequently the lands were resumed, and revenue was assessed upon them. The mortgagee in possession paid certain sums on account of revenue. The mortgagor sued to redeem, depositing in Court only the principal sum borrowed by him. It was held that the deposit was sufficient to save his right to redeem, but that he was not entitled to re-

(*y*) See N. W. P. v. 11, p. 147: 2 Agra, p. 163.

(*z*) N. W. P. v. 8, p. 447.

(*a*) N. W. P. v. 8, p. 441. See S. D. A. 1859, p. 144.

cover possession of the land until he had also paid into Court the amount which the mortgagee had paid for revenue, with interest (*b*). In another case, however, it was held under similar circumstances, that the mortgagee had a lien on the land for the sums paid by him for revenue, and that the mortgagor was not entitled to redeem on tender of merely the principal monies due on the mortgage (*c*).

And if a good and sufficient tender is made, but is rejected by the mortgagee, he is not entitled to any interest, after the date of the tender,—while if he is in possession of the land, he is accountable for the proceeds from that date, such proceeds being estimated according to the gross *jumma bundee*. All his rights under the mortgage contract are in fact at an end, on a proper tender being made: and interest from that date will be disallowed, even though the mortgagor does not plead his non-liability to pay it (*d*).

Regulation III. 1793, sec. 8 (*e*), required that all suits regarding the right to real property, should be decided in the district or zillah in which the land was situated: and this rule could not be dispensed with, except on permission previously obtained from the Sudder Court. A redemption suit had therefore to be brought in a Court of the district in which the lands to be redeemed were situated: and if the property came within the limits of more than one zillah, leave had to be obtained from the Sudder Court to include the whole matter in one suit, in some one of the Courts which had jurisdiction (*f*). And an error in jurisdiction was not a technicality which could be cured by Act IX of 1854 (*g*).

(*b*) 3 W. R p. 174.

(*c*) 3 W. R. p. 6. See 3 W. R. p. 162.

(*d*) N. W. P. v. 9, p. 1.

(*e*) And Reg. II. 1803, s. 5, both repealed by Act X of 1861.

(*f*) S. D. A. 1853, p. 305: 1856, p. 579. See *Ras Muni Dabee*, v. *Prankishen Das*, 4, Moore's Ind. Ap. p. 392.

(*g*) S. D. A. 1857, p. 1442. Act IX of 1854 is repealed by Act X of 1861.

Under the Civil Procedure Code if the suit be for land situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be brought in a Court within whose jurisdiction any part of the land lies, if the claim in respect of the value of the land, be cognizable by the Court: but the Court in which the suit is brought must apply to the District Court for authority to proceed with the same (*h*). If the property lie in different districts, the suit may be brought in any Court otherwise competent to try it, within the jurisdiction of which any portion of the land is situate, but in such case the Court in which the suit is brought must apply to the High Court for authority to proceed with the same; and if the application is made by a Court subordinate to a District Court, it must be submitted through that District Court (*i*). If the property lie in Districts subject to different High Courts, the application is to be made to the High Court to which the District in which the suit is brought is subject, and such High Court with the concurrence of the High Court to which the other District is subject, may give authority to proceed with the same (*j*).

I. As to the redemption of pure usufructuary mortgages.

1. *When the mortgage contract was entered into previous to the passing of Act XXVIII of* 1855.

The general custom in former times seems to have been that the usufruct of the mortgaged property, however lucrative it might be, should be taken in lieu of interest, and that there should be no redemption, until a payment or tender of the principal was made in full (*k*). Since the 28th of March 1780, however, the usufructuary mortgagee is confined to interest at 12 per cent. per annum, or at any lower rate which may have been agreed upon, and whatever sums are received from the land in excess

(*h*) Act VIII of 1859. Sec. 11.
(*i*) *Ibid.* Sec. 12.
(*j*) *Ibid.* Sec. 13. See sec. 14.
(*k*) See Reg. XV. 1793, s. 10.

of such interest, are applied to the reduction of the principal.

By Regulation XV of 1793, section 10, it is enacted:—"In cases of mortgages of real property, executed prior to the twenty-eighth day of March, one thousand seven hundred and eighty, in which the mortgagee may have had the usufruct of the mortgaged property, whether he shall have held it in his own possession, or not, the usufruct is to be allowed to the mortgagee, in lieu of interest, agreeably to the former custom of the country (provided it shall have been so stipulated between the parties), until the abovementioned date, subsequent to which, the same interest is to be allowed on such mortgage bonds, and also on all bonds for the mortgage of real property, which have been entered into on or since that date or that may be hereafter executed, as is allowed on other bonds, which have been or may be granted on, or posterior to such date, and no more; and all such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it shall have been realized from the usufruct of the mortgaged property, subsequent to the twenty-eighth day of March one thousand seven hundred and eighty, or otherwise liquidated by the mortgagor" (*l*).

All such mortgages are, therefore, to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with the simple interest due upon it, shall have been realised from the usufruct of the property or otherwise. They are redeemable after any length of time, until the lapse of sixty years from the date of the mortgage, or of the mortgagee's last acknowledgment in writing of the mortgagor's title or of his right of redemption (*m*).

(*l*) Reg. XV. 1793, Sec. 10: Reg. XVII. 1806, Sec. 5.; Reg. XXXIV. 1803, Sec. 9. All of these are repealed by Act XXVIII of 1855, *as to contracts entered into since the passing of that Act.*

(*m*) Act XIV of 1859, sec. 1. cl. 15. See W. R. 1864, p. 68.

The same rule applies to zur-i-peshgee leases, which as has been seen already have been decided to be of the nature of pure usufructuary mortgages, and are therefore subject to the rules which govern them (*n*). In one case, when the mortgagee held on after the end of his lease, his debt not being fully paid off, the Court said that it had no ground for acting summarily between the parties: and that in order to entitle him to possession, the mortgagor must proceed regularly after the whole amount of the debt had been realised from the property,—and this, whether the original term of the lease had expired or not. And the Court added that if a party holds over after the expiry of his lease, the terms of the lease not having been fully satisfied, he does so on exactly the same conditions as those on which he held during the period for which the lease ran (*o*).

All proceedings under Regulation XV of 1793, Section 10, must be taken by way of regular suit, and there is no provision for disposing summarily of cases which fall within its scope (*p*). The only point to be determined in such suits is, whether the mortgage debt has been satisfied in full. In one case (*q*) the mortgagor sued to recover lands (of which he had given a zur-i-peshgee lease) alleging that the whole debt had been paid off. The Court having taken the accounts, declared that Rupees 80,000 had been paid off, but that a balance still remained due, and therefore dismissed the suit. The mortgagor did not appeal from the decision: but the mortgagee did,—being aggrieved by the declaration that Rupees 80,000 had been paid, when in truth (as he contended) he had received a much smaller sum only. His ap-

(*n*) *Supra* p. 8. See S. D. A. 1859, p. 1566: 1860, v. 2, p. 174: 1862, p. 57: 2 Hay, p. 159: Marsh. p. 112, W. R. Sp. p. 33: 3 W. R. pp. 6, 162, 174.

(*o*) S. D. A. 1860, v. 1, p. 364.

(*p*) Cons. 277, 9th July 1817; Cons. 830, W. C., 20th Sept. Cal. C., 18th Oct. 1833. See S. D. A. 1860. v. 1, pp. 383, 390.

(*q*) Marsh. p. 112, W. R. Sp. p. 33.

peal was dismissed, the Court holding that as the only real issue in the suit was, whether the debt had or had not been satisfied in full, the finding as to the precise amount of any sum less than the whole sum due which had been realised was immaterial, and would not be conclusive against the mortgagee in a subsequent suit brought by the mortgagor for possession.

Nothing can ever deprive the mortgagor of his right to have the accounts of the mortgagee in possession taken, not even an admission in his plaint that some thing may possibly still be due on the mortgage (*r*). And the mortgagor is not bound to prove, independently of the accounts filed by the mortgagee, that the mortgage debt has been paid off (*s*): but if he fails eventually to prove that it has been satisfied, his suit will be dismissed with costs (*t*).

A condition in a mortgage deed that the mortgagor shall not claim an account from the mortgagee who has been in possession, does not in any degree bar the operation of the law by which the lender is to account to the borrower for the proceeds during his possession (*u*). As a general rule, the mortgagee may be called on by the mortgagor to account at any time, on the mortgagor's allegation that the whole sum due, with interest, has been received by him. And it has been held, that the mere fact that the term mentioned as that during which a zur-i-peshgee lease is to continue in force, has not yet elapsed,—or even a special agreement that the mortgagee shall remain in possession until payment of the debt is made in one sum, does not prevent the mortgage from

(*r*) N. W. P. v. 9, p. 371: S. D. A. 1858, p. 1691: 1859, p. 1076. But see in the case of an usufructuary conditional sale, *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.) and *post*, p. 138.

(*s*) S. D. A. 1855, p. 432: 1859, p. 5.

(*t*) N. W. P. v. 11, p. 3.

(*u*) 6 W. R. p. 6: S. D. A. 1851, p. 632: 1859, p. 1076. N. W. P. v. 10, pp. 51, 198: *Supra*, p. 54.

being at an end, whenever the mortgagee has received both principal and interest (*v*).

Doubts, however, have been expressed as to whether or not in the case of a zur-i-peshgee lease, the lessor and mortgagor can sue for possession and an account, until the expiry of the term for which the lease has been given. The Calcutta Sudder Court on the 15th April 1852, in a case from the report of which it does not appear whether the term of the lease had expired or not when the suit was brought, held that the lease in question must be declared cancelled, in pursuance of the Regulation which enacts that whenever the principal and interest have been re-paid from the usufruct, the mortgage is to be considered virtually and in effect cancelled and redeemed (*w*). And on the authority of this case, it was less then a fortnight afterwards, decided expressly that a zur-i-peshgee lease might be declared cancelled, prior to the expiry of the term of the lease. The Court remarked in giving judgment, "the lease is liable to cancelment, *whenever* the principal sum with interest," has been realised by the mortgagee (*x*). The same question, however, again arose two months later, when a different view of it seems to have been taken. The Court said that the precedent of the 15th April was inapplicable, as *there*, the term of the lease had expired before suit brought; and it was held that the mortgagee need not come to an account or give up possession, until the end of the lease. But although the point was raised and discussed, the judgment given by the Court appears to have been based not on any general principle of this kind, but on the special circumstances of the particular case before them (*y*).

The terms of a mortgage deed were:—"that the property should remain in the possession of the mortgagee

(*v*) 6 W. R. p. 6. S. D. A. 1852, pp. 280, 304: 1862, p. 57: N. W. P. v. 5, p. 266.

(*w*) S. D. A. 1852, p. 280.

(*x*) S. D. A. 1852, p. 304: 1862, p. 57.

(*y*) S. D. A. 1852, p. 577.

from the year 1249 to the year 1262, that all profit or loss should be his, and that no account should be rendered, nor demand made of restitution of the property, until the end of the stipulated period, and then only on paying back the principal money lent, at the end of the year." The Agra Sudder Court decided that the mortgagee was entitled to retain possession until the expiration of the term agreed upon, and that, until then, the mortgagor's suit for an account would not lie (*z*). And the High Court has more recently ruled that a mortgage made subsequent to the passing of Act XXVIII of 1855, cannot be redeemed until the period for which it was effected has expired (*a*).

There was a simple usufructuary mortgage from the profits of which the interest was to be discharged, and it was provided that if *at the end* of any year the mortgagor should refund the principal, he might redeem the property, but that he should not be at liberty to redeem during the course of the year. The Court held that if the principal was paid during the year, the mortgagor was entitled to possession at the end of the year, but not sooner (*b*).

But the mortgagor must be careful not to oust the mortgagee within the period during which he is entitled to remain in possession, unless he is prepared to show beyond doubt, that the debt has been fully paid off. If he does oust the mortgagee too soon, he renders himself personally liable to an action for the balance then due, the mortgagee being no longer restricted to his claim for possession (*c*).

A mortgagee to whom the usufruct was given in lieu of interest, was in possession. A purchaser of the mortgagor's right of redemption sued to redeem. It was held that it was not necessary to prove that the mortgage debt had been tendered, out of Court, to the mortgagee, and that the question whether the purchaser had or had not tendered the money to the mortgagee before he sued, was

(*z*) N. W. P. v. 3, p. 252. See S. D. A. 1858, p. 1840.

(*a*) 1 Agra, p. 91. But see 2 Agra, p. 122.

(*b*) S. D. A. 1860. v. 2, p. 208.

(*c*) S. D. A. 1853, p. 59.

one which only affected the right of the purchaser to recover his costs. The Court said that if the purchaser proved that he had offered the money to the mortgagee out of Court, he would be entitled to recover the property and to get his costs of suit, as well as the proceeds recovered by the mortgagee in excess of the interest at 12 per cent. and the costs of collection; and that if the purchaser failed to prove the previous tender, he would still be entitled to recover possession, on depositing the money within a certain time to be named in the decree,—but that in the latter case, he would not get any costs of suit (*d*).

The purchaser of a mortgagor's interest, with full notice of the mortgage, ousted the mortgagee in possession, denying that there ever was a mortgage. It was held that being a wrong-doer in ousting the mortgagee, he could not insist on the mortgagee rendering his accounts under Sec. 2 of Reg. XV 1793: that the purchaser would be personally liable in a suit to recover damages for ousting the mortgagee, but that he was not *personally* liable for the mortgage debt merely as representing the mortgagor in the lands pledged (*e*).

2. *When the mortgage contract has been entered into subsequent to the passing of Act XXVIII of* 1855.

The repeal of the usury laws has created a great change in the position of usufructuary mortgages; and agreements made since it took place, will be strictly enforced even although such as to give interest to the mortgagee at a higher rate than 12 per cent. per annum.

Section 4 of Act XXVIII of 1855, enacts that a mortgage or other contract for the loan of money, whereby it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

By Section 5, whenever, under the Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of

(*d*) 3 W. R. p. 128. (*e*) S. D. A. 1859, p. 1181.

land thereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract, or if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of 12 per cent. per annum; provided, that in the latter case the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated.

By Section 6, in any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage or conditional sale of landed property, or other contract whatsoever, entered into after the passing of the Act, *interest is to be calculated at the rate stipulated therein.* If no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, it shall be calculated at such rate as the Court shall deem reasonable.

So far as they affect contracts entered into since the passing of Act XXVIII of 1855, the following sections are repealed. Sections 4, 6, 7, 8, 9, 10, 11, Regulation XV of 1793: Sections 3, 5, 6, 7, 8, 9, 10, Regulation XXXIV of 1803: Clause 1, Section 23, Regulation VIII of 1805, so far as it extends the application of the above mentioned sections of Regulation XXXIV of 1803: Clauses 3, 4, 5, 6, Section 9 Regulation XIV of 1805, and so much of Section 11 as bears on the subject of usury: Section 2, Regulation VII of 1806, so far as it bears on the subject: and Sections 4 and 6 of the same Regulation.

The effect of the change is simply to bind parties strictly by the terms of the contract they have made. When the agreement is that the usufruct is to be taken in lieu of interest, the mortgagee will not be liable to account, however large his receipts may be: he will be entitled to continue in possession, until the principal is paid to him (*f*). If there is no mention of interest at all, it will be for the Court to say whether any is to be allowed, and at what rate. If any rate is mentioned, it will be calculated at

(*f*) See 6 W. R. p. 283.

that rate whatever it may be. In the two latter cases the mortgagee will be liable to account, but he will have to account only on the strict terms of his agreement.

II. As to the redemption of simple mortgages. The regulations lay down no particular rule as to the redemption of simple mortgages. In such cases, the mortgagor has merely to tender the whole balance due to the mortgagee for principal and interest, and may then require the mortgage deed to be delivered up. He must take care to provide himself with the means of proving his having made the tender: and if the tender is sufficient but is not accepted, he may bring a suit to have the mortgage deed cancelled, he offering to pay whatever is really due. A deed of mortgage is in fact of no effect after a legal tender has been made, and all its conditions and stipulations cease from that date: and therefore, when a proper tender has been made and rejected, the mortgagee ought not to be allowed any interest after the date on which it was made, and the costs of the redemption suit consequent on such rejection, should be thrown on him (*g*).

Simple mortgages where the mortgagee has been in possession, are redeemable in like manner as are pure usufructuary mortgages; and the mortgagor is not entitled to the summary procedure provided by Sec. 2, Reg. I. 1798, which refers to mortgages by conditional sale only (*h*). As in pure usufructuary mortgages, the liabilities and position of the parties will depend very much on the question whether the contract was entered into before, or after, the passing of Act XXVIII of 1855.

But a simple mortgage, whether usufructuary or not, can be redeemed, only previous to the mortgagee's bringing a suit for his money and having the property sold under decree in satisfaction of his claim. On the land being so sold, the mortgage is of course at an end, and there can no longer be any redemption.

(*g*) N. W. P. v. 9, p. 1. See S. D. A. 1860, v. 1, p. 390.
(*h*) S. D. A. 1860. v. 1, p. 383.

III. As to the redemption of mortgages by conditional sale, bye-bil-wufa, or kut-kubala. When the mortgagee has not had possession of the land, the mortgagor may redeem by tendering to the mortgagee or depositing in Court, the principal sum lent with the stipulated interest thereon, (not exceeding the rate of 12 per cent. per annum, if the contract was entered into before Act XXVIII of 1855 came into force) or, if interest be payable, and no rate has been stipulated for, with interest at the rate of 12 per cent.: or by tendering or depositing any less sum which is the total amount due for principal and interest. But if such smaller sum only is deposited, the mortgage will not be considered as redeemed, until it is admitted or established, that that sum covers the full amount due to the mortgagee (*i*).

The deposit must be made in the Dewanny Adawlut of the city or zillah in which the land is situated: and the judge receiving the same, will furnish the party who pays it in, with a written receipt for the amount, specifying the date on which, and the purpose for which, the deposit is made. The judge will, at the same time, cause a written notice of the deposit having been made, to be served on the mortgagee, and will pay to him the amount deposited, on his surrendering the bill of sale or mortgage deed, or showing sufficient cause why it cannot be surrendered (*j*).

The judge's notice generally calls on the mortgagee to take the money out of court, and to deliver up the mortgage deed, and such other title deeds as he may have in his possession, within a certain time,—the period named being any reasonable period, according to the distance of the mortgagee's residence from the station from which the notice is issued (*k*).

In all cases of mortgage by conditional sale, the mort-

(*i*) Reg. I. 1798, Sec. 2: Reg. XXXIV. 1803, Sec. 12: Act XXVIII of 1855, Sec. 5.

(*j*) Reg. I. 1798, Sec. 2: Reg. XXXIV. 1803, Sec. 12.

(*k*) Cons. No. 974, 7th August 1835.

gagor may redeem at any time either before or after the day of payment named in the contract, until the end of one year from the issue of notice of foreclosure by the mortgagee (*l*). The right of the mortgagor to redeem prior to the day fixed for payment, rests on express enactment (*m*).

In mortgages, however, entered into previous to the promulgation of Regulation XVII of 1806, there can be no redemption after the date on which it was originally stipulated that the sale should become absolute if the debt was not paid (*n*). As that Regulation has been now in force for more than sixty years, it is not likely that many cases will occur, which do not fall under its provisions (*o*). Such cases, however, are occasionally met with even now.

A suit was brought in Zillah Sarun in 1863 for the redemption of property mortgaged by way of conditional sale in 1801. The date on which the mortgage debt was to be paid off was the 28th September 1806. It was held (*p*) that Reg. XVII of 1806 took effect not from the date on which it was passed by the Governor-General in Council (11th September 1806), but from the date of its promulgation,—and that the *onus* of showing that the Regulation was promulgated in Sarun prior to the 28th of September 1806, lay on the plaintiff who sued to redeem: and the suit was dismissed because he failed to give such evidence.

The steps to be taken in redeeming a mortgage by conditional sale when the mortgagee has had possession, are the same as in cases in which he has not had possession.

(*l*) See *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.)

(*m*) Reg. I. 1798, Sec. 2. See *post* pp.

(*n*) See W. R. 1864, p. 183: and *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.)

(*o*) Reg. XVII. 1806, Sec. 7. Cons. No. 672, 20th Jan. 1832.

(*p*) 5 W. R. p. 88, a Full Bench decision which overrules W. R. 1864, p. 189.

There is this difference, however, between the two kinds of mortgage, that when the mortgagee has had the usufruct, the mortgagor need never deposit more than the principal sum borrowed by him, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. And if the mortgagor deposits a sum less than that required by law, that is to say less than the principal, alleging that the sum so deposited is the total amount due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and the usual notice given to the mortgagee: and if on investigation, it appears that the amount so deposited is the total amount due, the right of redemption will have been preserved to the mortgagor, and he will be entitled to recover his lands (*q*).

The mortgagor is entitled to receive possession summarily on depositing the principal sum borrowed, leaving the interest to be settled on an adjustment of the mortgagee's receipts and disbursements during the period he has been in possession (*r*). This adjustment must be carried out by a regular suit, one of the results of which may be the mortgagor's recovering his deposit or a part of it, if it exceeded what was really due. If the mortgagor is unwilling to deposit the whole principal sum, alleging that the whole, or part of it, has been paid, he can obtain possession of his lands only by regular suit.

It has been said that in all instances in which the lender on a bye-bil-wufa, kut-kubala, or mortgage by conditional sale has been in possession, he must account to the mortgagor for the proceeds of the estate while in his possession, in the same manner as in cases of a pure usufructuary mortgage (*s*). But the Privy Council have in the

(*q*) Reg. I. 1798, Secs. 2 and 3: Reg. XVII. 1806, Sec. 7.

(*r*) Cons. No. 339, 25th May 1821.

(*s*) S. D. A. 1855, p. 432. N. W. P. v. 9, p. 371. See *supra* pp. 126—132.

case of *Forbes* v. *Ameeroonissa* (*t*), decided that this is not so, and have laid down very distinct rules showing in what cases alone an account is necessary. Their Lordships say,—"The order of remand can be supported only on the principle that in all cases it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd section of Reg. I 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are 'In all instances wherein the lender on a bye-bil-wufa may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account,' &c. Two conditions are expressed: the possession of the mortgagee, and the necessity of an account. And a comparison of this with the preceding sections and with Regulation XVII. 1806, shows that that necessity arises, and need only arise, *Firstly*, When the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account: *Secondly*, When he has deposited all that he admits or alleges to be due: and *Thirdly*, When he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property."

The latter clause of section 3 of Reg. I. 1798 is as follows:—"But such part of the Regulation as directs that the mortgages therein referred to, are to be considered as cancelled and redeemed whenever the principal sum with the simple interest due upon it, shall have been realized from the usufruct of the mortgaged property, or otherwise liquidated by the mortgagor, being inapplicable to conditional sales where the mortgagee has enjoyed the usufruct, it is hereby declared not to apply thereto." The object of this declaration apparently was to show that in the case of an usufructuary mortgage by conditional

(*t*) 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

sale, foreclosure may take place, which it cannot do in the case of a pure usufructuary mortgage; and that it is only when the principal with simple interest has been realised from the usufruct or otherwise, *prior to the expiry of one year from the date of the mortgagee's issuing notice of foreclosure*, that such a mortgage will be considered virtually and in effect cancelled and redeemed. It was, in fact, intended to limit the application of the word "whenever." And its application is necessarily limited in the manner pointed out: for in all cases, if foreclosure has once finally taken place, the mortgagor's interest in the land is at an end, and he has no further claim of any sort on it.

If it were not that Reg. I of 1798, sec. 2 enables the mortgagor to redeem as early as he pleases, the object of the declaration might be taken to be to recognise the right of the mortgagee to resist being redeemed prior to the day of payment named in the mortgage deed. Under the English law the mortgagee has that right (*u*), and it is difficult to see on what principle of equity he is deprived of it.

With whatever view it was enacted, there has been a good deal of discussion and misunderstanding as to this clause and its meaning (*v*). In one case it was argued, that its effect was to prevent a mortgagee by conditional sale, from being accountable at all (*w*).

There is nothing, however, to prevent a mortgagor, whether by conditional sale or otherwise, so long as he is entitled to redeem, from doing so under sec. 10, Reg. XV of 1793 (*x*), if he pleases.

The Calcutta Sudder Court differed from the Agra Sudder Court on one rather important point. The former held that a mortgagor suing to redeem *before* the time limited in the deed of mortgage, on the ground that the mortgagee has realised his debt from the usufruct of the

(*u*) Coote on Mortgages, p. 828.
(*v*) S. D. A. 1851, p. 632: 1852, p. 831.
(*w*) S. D. A. 1851, p. 632.
(*x*) Reg. XXXIV. 1803. Sec. 9.

property, must deposit in Court the entire principal sum advanced. The latter held that there need be no deposit, when there is a denial that any balance is due.

It is very difficult to perceive any grounds for making a distinction between the two cases; and none appear in the following judgment, in which it is asserted:—"The question for consideration is, whether the plaintiff, the mortgagor, having omitted to make a previous tender of any sum in repayment of the loan he received (a question which was not mooted till after the appeal was referred to a Full Bench), can maintain his right of action, without such tender, on the general ground that he is entitled to call for accounts of collections made by the mortgagee in usufructuary possession, according to the rule laid down in the first part of sec. 3, Reg. I of 1798, and sec. 11, Reg. XV of 1793. We are of opinion that the plaintiff is entitled to judgment. The whole spirit and intent of Reg. I of 1798, and of Reg. XVII of 1806, are for the relief and security of borrowers upon conditional sales. The requisition of a previous absolute deposit of the entire principal sum advanced, must be complied with under Reg. I of 1798, where application is made for re-entry into possession before the period limited in the deed shall have expired. When the suit is brought *after* such period, and there is a denial of any balance due, we hold that, under sec. 7, Reg. XVII of 1806, the mortgagor is empowered to sue for restoration of possession, without any deposit, and also under sec. 11, Reg. XV of 1793, to demand a rendering of accounts by the mortgagee in possession, at any time previous to final foreclosure of mortgage being carried out by the latter. The mortgagor suing without a deposit, would, of course, be liable to lose his suit, if, on examination of accounts, a *deficit* appeared and the smallest amount might be established to be due" (*y*).

(*y*) S. D. A. 1849, p. 392: 1857, p. 503.

The Agra Sudder Court decided that the process was the same in either case. A mortgagor sued for redemption before the time stipulated, alleging that the debt had been paid off from the usufruct, but making no deposit. The Court said :—" The enactment which most clearly lays down the principles upon which a conditional seller should proceed, if he desires to redeem his estate, is Reg. I of 1798. Section 2 (z) commences by declaring that the borrower is ' at liberty to pay the amount due, on or before the date stipulated.' This sentence provides both for the *time* at which he may pay, and also for the *amount* to be paid, that is to say, the ' amount due.' But to avoid doubts, the law goes on to declare how this ' amount due' is to be ascertained. It is at first supposed by the law to be the principal sum, with or without interest according to circumstances. Such a deposit will secure redemption : but it by no means follows that the deposit of even a less sum will not have the same effect, for the law goes on to say :— ' Provided, however, that, if the borrower deposit a less sum, alleging that the sum so deposited is the total *amount due* to the lender for principal and interest, after deducting the proceeds of the land in his possession, such deposit shall be received ; and if the amount so deposited be the total amount due, the right of redemption shall be considered to have been preserved.' Now, if the borrower has not the power of demanding an adjustment of accounts in a regular suit for redemption, the Court do not see how the provisions of this law are to be enforced. The *amount due* can be ascertained, only after deducting the proceeds of the land. There is no limit to the smallness,—it might be one rupee,—it might be nothing. Section 3 confirms the foregoing section, and more particularly declares that the account is to be made up ' on the principles prescribed with regard to mortgages, as far as the same may be applicable to the nature of the case.' But there is one rule in regard to mortgages, which is not applicable to conditional sales,

(z) Reg. XXXIV. 1803, Sec. 12.

and the remaining part of section 3 makes the exception accordingly. Were it not for this special exception, no sale could ever become absolute, the words of the mortgage law being that 'mortgages are cancelled and redeemed *whenever* the principal with interest shall have been realised from the usufruct.' For, although a bye-bil-wufa may not have been redeemed by the usufruct or otherwise during the stipulated period, it may have been redeemed by the proceeds of the land during the years which followed the stipulated period; and if such proceeds could be taken into account, it is clear that no sale could ever become absolute. The Court see nothing in Reg. XVII of 1806, or in any subsequent Regulation, to affect the above construction of the law. The provisions of Reg. XVII of 1806 are *in addition to*, not in supercession of former laws, and the object of this enactment was to give the mortgagor additional facility of redemption, by enabling him to recover possession whenever he chose to pay down the principal, with or without interest according to circumstances, leaving the *account* to be adjusted subsequently in a regular suit under the provisions of the law (Reg. I of 1798) already referred to" (*a*).

These cases, however, show that both Courts agreed in holding that, in all mortgages by conditional sale, the mortgagor, *after* the period limited in the deed has expired, has the right to demand an adjustment of accounts and restoration of property in a regular suit for redemption, without making any deposit, or without depositing more than the amount due after deducting the profits of the usufructuary possession of the mortgagee and any payments made to him (*b*).

A mortgagor seeking an account from his mortgagee, and to redeem, must aver in his plaint, that the principal sum, with interest, has been tendered or been realised from

(*a*) N. W. P. v. 5, p. 456.
(*b*) N. W. P. v. 5, p. 456. S. D. A. 1847, p. 48. See S. D. A. 1855, p. 432 : 1857, p. 503.

the usufruct or otherwise (*c*). If he states an agreement to pay and receive interest at less than 12 per cent., and it appears from his own account that the debt cannot have been paid off if a higher rate were allowed, he must establish the agreement for the reduced interest, or his suit will be at once dismissed. And it was once decided that if a mortgagor rests his suit on an averment that, at a certain stipulated low rate of interest, the mortgage was redeemed, he cannot, on failing to establish the stipulation, go on to say that the principal, with full legal interest, has been realised: there must be a direct allegation of that in the plaint (*d*).

If the mortgagee in a common (*i. e.* non-usufructuary) mortgage by conditional sale, chooses to enter into possession and to remain in possession wrongfully, he must account fully for the mesne profits (*e*).

It has been held that if it appears from the mortgagor's own evidence, that he is not in a position to redeem in consequence of a balance being still due to the mortgagee, the suit is to be dismissed at once (*f*): and that when, on investigating the accounts, the receipts from the usufruct, or these receipts together with sums deposited or paid to the mortgagee, are found not to cover the amount due, the suit must be dismissed, however small the deficiency may be (*g*), and that the Court cannot give a conditional decree, that, on payment of the balance due, the mortgage is to be held redeemed (*h*). It may, however, be very much doubted whether the rule thus laid down is right. There does not seem to be anything in the Regulations to prohibit the Courts from making a conditional decree, that upon payment within a certain time, of the balance due, the mortgagor shall be declared to have redeemed the mort-

(*c*) See N. W. P. v. 11, p. 3: v. 9, p. 371: S. D. A. 1855, p. 432.
(*d*) S. D. A. 1852, p. 748.
(*e*) 7 W. R. p. 30.
(*f*) N. W. P. v. 6, p. 221.
(*g*) S. D. A. 1849, p. 392: 1852, p. 1120: N. W. P. v. 4, p. 37: v. 5, p. 104: v. 10, p. 543.
(*h*) N. W. P. v. 10, p. 543: 1860, p. 84: 8 W. R. p. 369.

gage. And to make such a decree is far less harsh, and much more equitable (with reference to the objects which parties entering into mortgage transactions have in view) than the course which the Courts, for no very apparent good reason, have usually followed.

When it appeared in the pleadings, and was proved, that a tender of the sum due was made previous to bringing the suit, but was rejected by the mortgagee, a decree that the mortgage should be redeemed on payment of the money so tendered, was held to be good (*i*).

A mortgagor who has got a decree to redeem and to be put in possession, may bring a subsequent suit for mesne profits as respects the time during which the mortgagee remained in possession *after* the institution of the suit (*j*).

When a mortgagor brings a suit for redemption and an account, after service of notice of foreclosure and the expiration of the year of grace, he must be prepared to prove that at the date of the expiry of the year of grace, the whole sum advanced, together with interest up to that date, had been realised from the usufruct, or otherwise liquidated. And this he must do, although the mortgagee has taken no further step since issuing the notice of foreclosure (*k*).

It has been said that as a general rule a mortgagor can after the expiry of the year of grace, raise, in a suit instituted by himself, any defence which he could plead in an action brought by the mortgagee for possession. And the Court expressed an opinion that as in a suit instituted by a mortgagee for possession, or to declare his title as absolute proprietor, on foreclosure, the mortgagor might clearly plead satisfaction of the mortgage debt prior to the expiry of the year of grace, the mortgagor is entitled to raise the question in a suit

(*i*) N. W. P. v. 5, p. 106.
(*j*) 7 W. R. p. 364.
(*k*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.). S. D. A. 1848, p. 711 : 1859, p. 127.

brought by himself, and to have the decision of the Court upon it (*l*).

On foreclosure taking place, that is to say on the expiry of the year of grace, the rights of the mortgagor are at an end, unless he can prove that the mortgage debt was in fact liquidated before the year expired. And one suing to redeem as mortgagor, after a conditional sale has been declared absolute, must do so within twelve years from the date on which the year of grace came to an end (*m*).

According to the terms of a compromise in a suit for redemption, the mortgagor was to get possession on paying a certain sum. The mortgagor paid the money, and ultimately obtained possession under an order of the Court. He then sued in the Revenue Court for his share of the *khurreef* or profits of certain years, as due to him by the mortgagee: this was, however, held to be not a question between co-sharers, but between mortgagor and mortgagee as to the liability of the latter to account,—and as such, not to be a matter cognisable by the Revenue Courts under Act XIV of 1863 (*n*). The parties appear to have been co-sharers in the property, of which the mortgagor had mortgaged his own share.

(*l*) S. D. A. 1856, p. 503.

(*m*) S. D. A. 1854, p. 137: 1859, p. 1494: 1861, v. 1, p. 8: 8 W. R. p. 476. Act XIV of 1859, sec. 1. cl. 12.

(*n*) 2 Agra, p. 4 (Rev. Ap.).

CHAPTER IX.

OF THE REMEDIES OF THE MORTGAGEE, INCLUDING FORECLOSURE.

The mortgage debt being the principal, and the land pledged being merely a security, the mortgagor, notwithstanding his breach of condition, still continues relievable from the strict letter of his contract, on payment of principal, interest and costs. But this, except in the case of pure usufructuary mortgages, is only in the event of the mortgagee not coming forward and seeking the assistance of the law to enable him to enforce his security, which assistance will be granted to him, in order that he may not remain subject to a perpetual account, or be deprived for ever of the money advanced by him. On this principle rests the doctrine of foreclosure, in the application of which, the forbearance of the law towards the mortgagor is carried very far. The mortgagee however, when once he has obtained his decree declaring his title as absolute proprietor on foreclosure, is freed from all further uncertainty, as the foreclosure can never be opened or disturbed on other grounds than those on which the Courts will in ordinary cases set aside their own decrees. In England, equity is so anxious to afford every reasonable relief to the mortgagor, that even after a decree of foreclosure has been made, and the mortgagee has been in possession for many years, the Courts will, under special circumstances, open the decree,—although, after

twenty years' possession, this will not readily be done (*o*).

The law as to the Limitation of suits instituted on or after the 1st of January 1862, is to be found in Act XIV of 1859 (*p*).

Suits to recover money lent, or interest, or for the breach of any contract, must be brought within the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest, or a contract in writing signed by the party to be bound thereby or by his duly authorized agent (*q*). If there is a written engagement or contract, and such engagement or contract could have been registered by virtue of any law or Regulation in force at the time and place of the execution thereof, the suit must still be brought within the period of three years from the time when the debt became due, or when the breach of contract first took place, unless such engagement or contract was registered within six months from the date thereof (*r*) in which case the period is six years (*s*).

In cases governed by English law upon debts and obligations of record and specialties, the suit must be instituted within the period of twelve years from the time the cause of action arose (*t*).

A suit for possession by a mortgagee, or for the recovery of immoveable property, or of any interest in immoveable property must be brought within the period of twelve years from the time the cause of action arose (*u*).

(*o*) Coote on Mortgages, p. 496.

(*p*) See Act XI of 1861.

(*q*) Act XIV of 1859, sec. 1. cl. 9.

(*r*) *Ibid.* cl. 10. But this is qualified by sec. 27 of Act XX of 1866, the Indian Registration Act: and see sec. 51 of that Act.

(*s*) Act XIV of 1859, cl. 16.

(*t*) *Ibid.* cl. 11.

(*u*) *Ibid.* cl. 12. See 2 Agra, p. 244.

Lands in the mofussil were mortgaged by a deed in the English form, and the mortgagor after having made default sold the property to a purchaser who got possession and held adversely to the mortgagee who never had possession at all. It was held that as soon as default was made, the mortgagee might have sued the mortgagor for possession of the estate, and that from that date the limitation law began to run against the mortgagee, in respect of a suit for possession (*v*).

So in another case, the mortgagee might (under his mortgage deed) have taken possession on the mortgagor's making default in 1255: he did not, however, avail himself of his rights, but in 1267 sued for and obtained a decree for foreclosure. Subsequently he sued to recover possession against purchasers of the mortgagor's rights who had been in possession since 1253. The Court held that the mortgagee's cause of action arose on the first default made by the mortgagor in 1255,—that the decree in the foreclosure suit gave no fresh starting point,—and that the suit as against the purchasers was barred under clause 12, section 1 of Act XIV of 1859 (*w*).

But as between the mortgagor and mortgagee, it has been held by the Agra High Court, that a default may be made by the mortgagor which may give the mortgagee a right to sue or enter into possession, if he chooses to assert such a right, but which may notwithstanding have no effect whatever in altering the nature of the mortgage title. If notwithstanding one or more defaults, there is no repudiation of the mortgagee's right, but on the contrary a recognition of it, there is nothing in the law to limit the time within which the mortgagee may foreclose (*x*).

When there is an unregistered bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that

(*v*) 6 W. R. p. 269.
(*w*) 6 W. R. p. 184.
(*x*) 1 Agra, F. B., p. 102.

the lands are charged with the payment of the debt and for an order for the sale of the lands, as subject to the charge, in satisfaction of the debt, falls within cl. 12, sec. 1 of Act XIV of 1859, and must be brought within twelve years from the origin of the cause of action (*y*).

But where a suit on such a bond is brought merely to recover the money due on it and not to enforce the charge upon the lands, the limitation applicable is that prescribed in cl. 10, sec. 1 of Act XIV of 1859 (*z*).

If the person who, but for the law of limitation, would be liable to pay a debt, has admitted that such debt or any part of it is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, is to be computed from the date of such admission; but if more than one person be liable, none of them becomes chargeable by reason only of a written acknowledgment signed by another of them (*a*).

An account stated, acknowledged to be correct and signed by an agent, is not an acknowledgment in writing signed by his principal within the meaning of sec. 4 of Act XIV of 1859 (*b*). And a memorandum of payments made, endorsed on the bond and signed by the defendant, is not an acknowledgment by him within the meaning of that section (*c*),—nor is a balance struck and orally acknowledged to be correct (*d*).

In suits in Courts established by Royal Charter, by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action is to be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt (*e*).

(*y*) 9 W. R. p. 170 (a Full Bench decision, overruling 6 W. R. pp. 132 and 318). See 2 Madras, pp. 51 and 307.

(*z*) 8 W. R. p. 335.

(*a*) Act XIV of 1859, sec. 4.

(*b*) 8 W. R. p. 1.

(*c*) 8 W. R. p. 335.

(*d*) 1 Agra F. B. p. 94.

(*e*) Act XIV of 1859, Sec. 6.

If any person entitled to a right of action has by means of fraud been kept from the knowledge of his having such right, or of the title upon which it is founded, or if any document necessary for establishing such right has been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessary thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, must be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document (*f*).

In suits in which the cause of action is founded on fraud, the cause of action is to be deemed to have first arisen at the time at which such fraud became first known by the party wronged (*g*).

If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability,—as being a married woman (in a case to be decided by English law), a minor, idiot or lunatic (*h*)—, the action may be brought by such person or his representative within the same time after the disability has ceased, as would otherwise have been allowed from the time when the cause of action accrued, unless such time exceeds the period of three years, in which case the suit must be commenced within three years from the time when the disability ceased. If at the time when the cause of action accrues to any person, he is not under a legal disability, no time is allowed on account of any subsequent disability of such person, or of the legal disability of any person claiming through him (*i*).

The time during which the defendant has been absent from the British territories in India is to be excluded

(*f*) Act XIV of 1859, sec. 9.
(*g*) *Ibid.* sec. 10.
(*h*) *Ibid.* sec. 12.
(*i*) *Ibid.* sec. 11.

from the computation of the period of limitation unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law (*j*). And the time during which the claimant, or any person under whom he claims, has been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause has been unable to decide upon it or has passed a decision which, on appeal, has been annulled for any such cause, including the time during which such appeal has been pending, is to be excluded from the computation of the period of limitation (*k*).

If any person without his consent has been dispossessed of immoveable property otherwise than by due course of law, he or any person claiming through him is, in a suit brought to recover possession of such property, entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided, that the suit be commenced within six months from the time of such dispossession. But this does not bar the person from whom such possession has been so recovered, or any other person, from instituting a suit to establish his title to the property and to recover possession of it within the ordinary period of limitation (*l*).

Under the old law of limitation, as under the new, the period of limitation as between the mortgagor and mortgagee, is not to be calculated from the date of the mortgage deed, unless it so happens that it was on that date that the cause of action first arose. If the suit is to set aside a mortgage deed, the cause of action arises on the day the deed is executed, except in cases of fraud, when the plaintiff may have the benefit of section 9 of Act XIV of 1859 (*m*). If the suit is for possession, the

(*j*) Act XIV of 1859, sec. 13.
(*k*) *Ibid.* sec. 14.
(*l*) *Ibid.* Sec. 15.
(*m*) 2 W. R. p. 273 *note.*

twelve years count from the earliest date on which the plaintiff was entitled to possession,—if for money, from the day on which he might first have sued for it. Thus if the terms of the agreement are such that the mortgagee is entitled at once to possession as usufructuary, a suit for possession must be instituted within twelve years from the date of the deed (*n*).

Where the deed stated that possession had already been given to the mortgagee, who was to hold it for three years, at the end of which time the mortgagor might redeem on payment of the loan with interest, and in default of his doing so, the property was to become the mortgagee's—it was held, that the cause of action at once arose on the failure of the mortgagee to obtain the possession agreed upon, and that as he had never been in possession, a suit for possession by him must be brought within twelve years from the date of the deed (*o*).

When a lease by way of mortgage was given in consideration of an advance, and the mortgagee held possession for many years, but was afterwards ousted, and after a time sued to recover what was due on the loan with interest, the twelve years during which his suit would lie, were counted from the time when he was turned out, not from the date of the deed under which he entered (*p*).

Certain mortgaged lands were sold by the Collector for arrears of revenue, while a suit for possession by the mortgagee was pending in the Civil Courts. The surplus proceeds of the sale were, before the suit for possession was decided, appropriated by the Collector in payment of arrears on other estates belonging to the mortgagor. The mortgagee obtained a decree for possession. Within twelve years from the date of that decree, but more than twelve years from the date of the transfer made by the

(*n*) S. D. A. 1857, p. 1816. See N. W. P. v. 5, p. 239 : v. 6, p. 54 : v. 7, p. 322 : v. 8, pp. 100, 391 : v. 10, p. 243 : v. 11, p. 72 : 1860, p. 280 : 7 Sel. Rep., p. 77.

(*o*) N. W. P. v. 8, p. 550. See v. 10, p. 243.

(*p*) S. D. A. 1848, p. 722.

Collector, the mortgagee brought an action against him for the recovery of the surplus proceeds so transferred. The majority of the Court held that his suit was barred by lapse of time, and would not lie. And no doubt, the mortgagor's allowing the property to be sold for arrears, was such a breach of contract on his part, as gave the mortgagee an immediate right of action for the recovery of his debt (*q*).

A *birt putr* was granted, which was a deed of absolute sale, under which, if it had been unaccompanied by any other document, it would have been necessary to sue for possession within twelve years from the date of execution. But the sale was rendered conditional by means of an ikrarnamah executed eight days afterwards, which gave the seller a right to redeem at the end of five years, on repaying the sum advanced to him with interest. The Court decided that the *birt putr* was virtually put in abeyance by the subsequent deed, and that the right of the purchaser under it did not revive until the default of the seller at the end of the five years:—that consequently no cause of action arose until the expiration of the five years, and as a suit for possession within that period could not have been entertained, a suit within twelve years from its expiry was in time. It was further the opinion of the Court, that had the *birt putr* or the ikrarnamah contained any stipulation that the purchaser and lender should enter into possession, the date on which he might first have entered would have been the time when his cause of action first arose, and within twelve years from which his suit must have been brought (*r*).

But in calculating the date from which limitation begins to run, care must be taken not to confound the time at which the mortgage debt becomes recoverable, with the time at which some collateral debt, included in the deed, becomes due. Thus, where the mortgagor was to remain

(*q*) S. D. A. 1854, p. 182. See *supra*, p. 83.

(*r*) N. W. P. v. 8, p. 391: v. 9, p. 130. See v. 10, p. 243.

in possession at a monthly rent, and in default of payment, the mortgagee was to take possession, the mortgagor having failed in his first and all other payments, it was held that the limitation as to the mortgage debt, did not commence on these defaults (*s*).

It was held by the late Sudder Court at Agra that when the mortgage debt is re-payable by instalments, on default of payment of any one of which the whole becomes due and the mortgagee may foreclose, limitation as regards a claim for possession runs from the date of the first default, and a suit for foreclosure must be brought within twelve years from that date (*t*). But this decision has been overruled by the High Court which has held that the mortgagee is not bound to foreclose on the first default but may proceed to foreclose upon a subsequent default,—the previous one notwithstanding (*u*).

If a debtor makes payments in respect of instalments which are barred by lapse of time, he cannot afterwards say he need not have paid them, and set them off against later instalments which are not barred (*v*).

The cause of action of a purchaser at a sale for arrears of revenue under Regulation XI of 1822, arises on the date of confirmation of the sale by the Board of Revenue (*w*).

In the case of a purchase at a sale in execution of a decree, the Agra Sudder Court held that it arose on the sale being confirmed by the Court (*x*). But the Calcutta High Court has held (*y*) that it arises on the date of sale and not on the date on which the purchaser gets his certificate. A purchaser at a sale in execution of a decree found that the lands he had purchased were under farm for arrears of revenue. Many years afterwards he brought a suit to obtain possession: and it was held

(*s*) N. W. P. v. 5, p. 239.
(*t*) N. W. P. v. 7, p. 322.
(*u*) 1 Agra, F. B. p. 102.
(*v*) N. W. P. v. 8, p. 361: v. 9, p. 477.
(*w*) S. D. A. 1855, pp. 319, 350. See W. R. 1864, p. 278.
(*x*) N. W. P. v. 10, p. 287.
(*y*) W. R. 1864, p. 279.

that as he could not have got possession until the expiry of the farm, it was not until that date that his cause of action arose (*z*).

A and B were joint proprietors of certain property, and A's share was sold under a decree against him. The purchaser dispossessed B as well as A, and took possession of the whole property. B's cause of action arose on his being dispossessed, not on the date of the decree (*a*).

In one case, the plaintiff sued to set aside a deed of mortgage by conditional sale executed by his brother who, the plaintiff alleged, had no power to make the mortgage without the plaintiff's consent. The time for payment of the money lent elapsed: three years subsequently, notice of foreclosure was given to the plaintiff, who appeared and objected to the foreclosure, but unsuccessfully. At the end of the year of grace the foreclosure became complete, and the mortgagee who had previously had possession remained in possession. Almost twelve years after the foreclosure was completed the plaintiff brought his suit. The Court held he was not barred, and that the twelve years counted from the expiry of the year of grace, when the mortgagee's title became independent and absolute (*b*). This decision however is bad: for the plaintiff's cause of action dated from the execution of the deed, or at any rate from the date when the existence of the deed became known to him which was not later than the notice of foreclosure.

A mortgagee who has issued notice of foreclosure, was held under the old law of limitation to have a further period of twelve years from the expiry of the year of grace, during which he might sue to be put in possession: but if he let twelve years pass without bringing his suit for possession on foreclosure, his right was wholly lost to him (*c*).

(*z*) N. W. P. v. 9, p. 559: v. 10, p. 18.

(*a*) N. W. P. v. 9, p. 540. See p. 543. The following cases bear on the subject of adverse possession, N. W. P. v. 9, pp. 345, 395: v. 10, p. 247: and see *post*, pp. 157-159.

(*b*) S. D. A. 1856, p. 817.

(*c*) 7 Sel. Rep. p. 45: S. D. A. 1857, p. 1816: 1859, p. 1494. See 1856, p. 817.

The Agra Sudder Court, however, declared this rule to be good only when notice of foreclosure had been issued at the earliest possible moment (*d*). But this decision has been recently overruled, after discussion, by the High Court in a case in which it was held that when a mortgage is duly foreclosed, the twelve years within which the mortgagee must sue for possession run from the date of final foreclosure, whether the mortgage was foreclosed at the earliest possible day or not (*e*).

Their Lordships of the Privy Council have remarked that "it cannot be laid down as a rule universally true, that under Reg. III of 1793, sec. 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of bye-bil-wufa simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute: for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation and not from the laches of the defendant or of others before him"(*f*).

In certain cases undisturbed possession for twelve years gave a good title under the old law, without reference to the time when the plaintiff's cause of action arose. In the case of *Enayut Hossein* v. *Sayud Ahmed Beg* (*g*), the Privy Council said that the object of Reg. III of 1793, sec. 14, and II of 1805, sec. 3, cls. 1, 2, and 3, "appears to be to protect the title of parties who have been in possession under a *bonâ fide* title, or what is supposed to be a *bonâ*

(*d*) N. W. P. 1860, p. 39. See N. W. P. v. 9, p. 234.

(*e*) 1 Agra, F. B. p. 102.

(*f*) *Prannath Roy Chowdry* v. *Rookea Begum*, 7 Moore's Ind. Ap. p. 323.

(*g*) 7 Moore's Ind. Ap. p. 238: *Sheik Imdad Ali* v. *Must. Koosbee Begum*, 3 Moore's Ind. Ap. p. 1: *Gunga Gobind Mundul* v. *Collector of 24-Pergunnahs*, 7 W. R. p. 21 (P. C.). See W. R. 1864, p. 159.

fide title, for the period of twelve years. But certain exceptions are introduced into those Regulations, amongst others that the limitation of twelve years is not to apply where the party has been precluded by good and sufficient cause from bringing his suit within the period. Neither is it to apply, if the original possession obtained by the party in possession has been obtained unjustly: and the Regulations are not to apply to cases where the property had so come into the hands of other persons from whom the parties in possession may have derived their title, and shall not have been subsequently held under a just and honest title."

But it is only a really *bonâ fide* possession of twelve years that will give a title; and when the title has been throughout disputed and litigated, the possession even though undisturbed, is not a *bonâ fide* quiet possession which will give any title. A's title accrued in 1813, but a suit which he brought in order to establish it, was not finally decided by the Privy Council till 1842. It was held that as it was impracticable for A to bring a suit for possession until the question raised in his first suit was decided by the Privy Council, a suit for possession brought within twelve years from the date of the decree in 1842, was not barred. And it was also held that the possession of the other party under a Foujdary order by a Magistrate, although undisturbed and extending over much more than twelve years, was no *bonâ fide* possession so as in any way to bar A's right (*h*).

A mortgagor sold his rights and interests, and put the purchaser in possession. Some years afterwards, the mortgagee seems to have obtained a decree of foreclosure of his mortgage, but he did not make the purchaser who was in possession a party to the suit, and consequently was unable to turn him out. After the purchaser had been in undisturbed possession for fourteen years, the

(*h*) *Rajah Enayut Hossein's* case, 7 Moore's Ind. Ap. p. 238. See 1 Hay, p. 306: 8 W. R. p. 373.

mortgagee brought a suit against him and others for possession. The majority of the Court appear to have been of opinion, that the twelve years counted from the date on which the purchaser obtained possession, and that he having been in undisturbed possession for more than twelve years, no suit would lie against him, "under the general law of limitation." But from this, one judge dissented, and held that limitation ran from the date on which the mortgagee first became entitled to sue for possession, not from the date on which the defendant first obtained possession (*i*).

In a very similar case, the mortgagor's rights had been sold under decree of Court, and the purchaser obtained possession. The mortgagee subsequently got a decree of foreclosure in the Supreme Court, but did not make the auction purchaser a party to the suit. Within twelve years from the date of the decree, but more than twelve years from the date of the purchaser's getting possession, the mortgagee brought a suit for possession on his decree, making the purchaser defendant. The suit was dismissed as being barred by the law of limitation (*j*). So, a second mortgagee having obtained a decree of foreclosure in the zillah court, was put in possession of the mortgaged property. A year or two afterwards, the first mortgagee sued in the Supreme Court, and got a decree for foreclosure. But he did not sue for possession on that decree, until the lapse of more than twelve years from the date of the second mortgagee's getting possession, although within twelve years from the date of his own Supreme Court decree. The Court decided, that the first mortgagee's right was barred. "The effect and principle of the law of limitation is, that an unquestioned *bonâ fide* possession for twelve years, of itself creates a title of property, unless either the plaintiff can give good reason for not preferring a suit within that term, or, if he does show admissible cause for his delay, can prove that posses-

(*i*) S. D. A. 1853, p. 21. (*j*) S. D. A. 1853, p. 210.

sion was originally obtained by means of force or fraud, the circumstances of which should be specially set forth, so as to be made matter of a special preliminary issue. The analogy of conflicting sales, of an earlier or later date, does not apply. There is, in our Regulations, a special means of obtaining a proprietary title and foreclosure, whatever may be the date of mortgage; and the possession of a title acquired in that legal course, cannot after twelve years be disputed, except upon pleas of absolute fraud or nullity" (*k*).

A suit was brought for the recovery of certain lands, and the plaintiff got a decree. In carrying out the decree, he found certain persons who had not been parties to the suit, in possession of a portion of the lands. They had been so for many years. Within twelve years from the date of his own decree, but more than twelve years after these third parties entered on possession, the plaintiff sued to establish his right as against them. It was held by a majority of the Court, that the plaintiff's cause of action arose on the date on which the defendants entered into possession, and that consequently his right of action was barred, as no fraud, was shown (*l*).

A fraudulently obtained possession, and B purchased the property at an execution sale under a decree against A. More than twelve years after the dispossession by A, but less than twelve years after the purchase by B, a suit for possession was brought against the latter by C. It was held that C's right of action was not barred, B not having possessed under a *bonâ fide* title for twelve years (*m*).

Possession obtained by a mortgagee under his mortgage, is not a *bonâ fide* possession, or such as can convey a permanent title (*n*). "Under the Regulation, an adverse

(*k*) S. D. A. 1853, p. 546. So in S. D. A. 1854, p. 1: but this case (*Prannath Roy Chowdry's*) was reversed on appeal by the Privy Council;—see 7 Moore's Ind. Ap. p. 323.

(*l*) S. D. A. 1855, p. 187.

(*m*) N. W. P. v. 9, p. 391.

(*n*) N. W. P. v. 9, p. 425. See S. D. A. 1857, p. 121.

title must also be a *bonâ fide* title under the shorter period of limitation, and as neither mortgagor nor mortgagee can in ordinary cases be unconscious of the conditional nature of their own titles, there is no ground for presuming generally, between the immediate parties, adverse title from mere length of possession" (*o*).

When on the face of the record it appeared that more than the twelve years had elapsed, the plaintiff, who considered that his right of action was not barred on the ground that his case fell under cl. 1, sec. 3, Reg. II of 1805, was under the old law required distinctly to set forth his grounds either in the plaint or in the replication, specially claiming exemption from the operation of the ordinary limitation rule. And this he had to do whether the defendant pleaded that his claim was barred or not (*p*). And before a claim, otherwise barred, could be held not to be so on the ground that it fell under cl. 1, sec. 3, Reg. II of 1805, it was necessary that the Court should find *distinctly* that there was fraud or force in the original transaction, and no twelve years' *bonâ fide* possession (*q*).

A decree that the right to certain property is barred, extends to the right to *chur* land attached, although no special mention of the *chur* is made in the decree (*r*).

It has been held, that in cases of mortgage,—as well of simple mortgage, as of mortgage by conditional sale,—the cause of action of a third party (as of one who claims to be proprietor of the pledged land) arises at the date of the deed, not at the date of making the sale absolute,

(*o*) *Prannath Roy Chowdry's* case, 7 Moore's Ind. Ap. p. 323. S. D. A. 1860. v. 1, p. 443. See 2 Madras, p. 382.

(*p*) N. W. P. v. 10, p. 273 : S. D. A. 1855, p. 203. Under the Code of Civil Procedure if the cause of action has accrued beyond the period ordinarily allowed for commencing the suit, the ground upon which the exception is claimed must be stated in the plaint. Act VIII of 1859, sec. 26.

(*q*) N. W. P. v. 10, p. 248.

(*r*) S. D. A. 1855, p. 454.

or of bringing the land to sale in satisfaction of the mortgage debt. The rendering the sale absolute, or bringing the land to sale, is a mere consequence depending upon the original pledge, and not a separate transaction by itself. The injury done is complete so far as third parties are concerned, unless the mortgagor avails himself of the condition enabling him to redeem,—of his doing which, there can be no certainty (*s*).

The law of limitation ought always to be strictly applied. A suit is barred if not instituted within the prescribed time, even although the time for its institution expires on a holiday (*t*). But if the time expires when the Court is unexpectedly and unauthorisedly closed, the suit is not barred if the plaint is filed on the day the Court re-opens, if the plaintiff shows that, but for the Court being closed, he would have instituted his suit strictly within time (*u*).

Under the special Act IX of 1859, a suit by a mortgagee for possession, on the ground of foreclosure, of a rebel's property sold under that Act, is barred by limitation if not brought within one year from the date of seizure or sale (*v*).

Under the old law, every suit and complaint of a civil nature, had to be brought in the courts of the zillah or district within the limits of whose jurisdiction the real property to which the suit related was situated, or in other cases, within the limits of whose jurisdiction the cause of action arose, or the defendant at the time of the commencement of the suit resided as a fixed inhabitant (*w*).

(*s*) S. D. A. 1857, p. 1001 : N. W. P. v. 6, p. 1.

(*t*) 3 W. R. p. 5 (S. C. Ct.), a decision of a Full Bench. See 6 W. R. p. 40 : 2 Madras, p. 468 : N. W. P. v. 8, p. 13 : v. 10, p. 411.

(*u*) N. W. P. v. 8, p. 428. See 8 W. R. pp. 73, 223.

(*v*) 6 W. R. p. 42. See W. R. 1864, pp. 2, 5, 377 : 1 Agra, pp. 46, 191.

(*w*) Reg. III. 1793, Sec. 8 : Reg. II 1803, Sec. 5. N. W. P. v. 10, p. 4.

Under the Civil Procedure Code a suit brought by a mortgagee to recover the amount due to him, must be brought in a Court within the limits of whose jurisdiction the cause of action arose, or the defendant at the time of the commencement of the suit dwells or personally works for gain (*x*). If the suit be for possession of the property mortgaged, the rules as to the Court in which it is to be instituted are the same as those which apply in the case of redemption suits (*y*).

A suit for possession by the holder of a zur-i-peshgee lease, will not lie in the Revenue Courts (*z*). Nor will a suit lie in the Revenue Courts, to cancel a zur-i-peshgee lease (*a*).

It has been ruled, that when land is mortgaged to two persons jointly, in security of a sum advanced by them in equal proportions, an action by one for his share of the money will lie, although he does not make his co-mortgagee a party to the suit (*b*).

Where one of two joint mortgagees (by way of simple mortgage) sued for his moiety of the debt, and got a decree for it, and in execution seized and sold the mortgaged property,—it was held that the other mortgagee might sue for *his* moiety and have the lands sold a second time in execution of *his* decree, unless the purchaser at the first sale chose to redeem. In this particular case, the purchaser took with notice of the claim of the other mortgagee (*c*). This decision, however, cannot safely be followed as a precedent. There is no doubt that as a general rule, when the mortgagees are joint, and there is in the mortgage contract no express severance of their interests, the suit for the recovery of the money due upon the mortgage must comprise the interests of all the mortgagees, they being

(*x*) Act VIII of 1859, sec. 5.

(*y*) *Supra*, p. 125. Act VIII of 1859, secs. 5—14.

(*z*) 8 W. R. p. 302.

(*a*) 8 W. R. p. 310. See 1 W. R. p. 52.

(*b*) N. W. P. v. 8, p. 91.

(*c*) 3 W. R. p. 130.

made parties to the suit either as plaintiffs or as defendants.

Where there was a large body of co-sharers in an estate, which had fallen into arrears and was about to be sold by Government, and certain persons saved the lands from sale, by advancing the sum required, in return for which they got a conditional sale of the property executed by thirty-nine sharers, it was held that as this sale had been for many years recognised by the whole body of sharers, the mortgagees were entitled to foreclose the mortgage against the whole body, although it appeared that four or five sharers were not in any way parties to the execution of the original deed of mortgage (*d*).

It is only in mortgages by bye-bil-wufa, kut-kubala, or conditional sale, that foreclosure can occur.

In pure usufructuary mortgages, including those by lease, nothing more than a temporary enjoyment of the land is given to the mortgagee, liable to be put an end to at any moment (unless the mortgagor is barred under cl. 15, sec. 1 of Act XIV of 1859), on the mortgage debt being cleared off (*e*). In simple mortgages, and in mortgages by bye-bil-wufa, kut-kubala or conditional sale, whether accompanied by possession and usufruct or not, the mortgagor may, on making default, be deprived of his whole interest in the property he has pledged; but in the former case the rights of the mortgagor are, under a decree of Court, put up for sale, and transferred to whomsoever may be declared the purchaser: in the latter, foreclosure takes place, that is to say, all the interest of the mortgagor in the mortgaged lands ceases, and passes directly from him to the mortgagee.

The mortgagee is bound by the terms of his contract, and cannot sue to foreclose, or to have his debt paid or the land sold in satisfaction of it, until the time fixed

(*d*) N. W. P. v. 9, p. 133. (*e*) See S. D. A. 1859, p. 382.

by the contract for the re-payment of the loan has passed (*f*).

There was a zur-i-peshgee lease for ten years at a certain fixed *jumma*, with an express contract by the mortgagor to repay the principal on a day named: and the lease provided that the mortgagee should retain a certain sum annually by way of interest and Government revenue, and should pay to the mortgagor the residue of the annual *jumma* which remained. It was also agreed that if the income of the property improved through the agency of the mortgagee, the mortgagor should have no claim to it: that the security should remain in force till the date of payment: and that meanwhile the mortgagor would not sell or mortgage the property. It was held that the mortgagee had a right to sue the mortgagor personally for the amount due (after the period fixed for payment had passed), and also to have the amount realised by sale of the property mortgaged. And further, that, as the mortgage was entered into subsequent to the repeal of the usury laws, the mortgagee was not bound to account for receipts from the property in excess of the annual *jumma* named in the lease (*g*).

I. In a case of simple mortgage, the mortgagee may bring his suit at any time (except where the ordinary limitation rules intervene) after the debt has become due according to the terms of the agreement: and no notice of the intention to sue need be given to the mortgagor, more than is required to be given to the defendant in any ordinary suit. The suit is brought for the recovery of the sum lent, with interest and costs, and for a declaration of the mortgagee's lien on the land. If the property is in the possession of third parties who claim it as purchasers, or otherwise in a manner adverse to the mortgagee, they should be made defendants, so that the claims of all who may have, or assert an interest in the matter, may be disposed of in one suit.

(*f*) See S. D. A. 1854, p. 507. (*g*) 6 W. R. p. 283.

The Court after inquiring into the amount remaining due, will give a decree for it and make a declaration as to the mortgagor's lien. If the mortgagor does not pay the sum decreed, the mortgagee must apply to the Court to have the mortgaged land sold in execution: and if the Court has declared his lien established, he will be entitled to an order for the sale of the rights and interest of the mortgagor in the land, as they stood when the mortgage was entered into. Any surplus which remains after liquidating the debt, belongs to the mortgagor.

The decree is always against the mortgagor personally, and if the suit has been properly framed, should declare the mortgagee's lien on the land (*h*). If the land does not produce a sufficient sum, the mortgagee may still proceed against the mortgagor for the residue unpaid, as an ordinary decree-holder. And he is not restricted to the particular property over which he has a lien. Thus, if his lien extends only to one moiety of an estate and that moiety proves insufficient, he may take out execution against the whole estate, if the other moiety also belongs to the debtor (*i*).

A mortgagee suing for a debt secured by simple mortgage, and to have the pledged property sold in satisfaction of it, need not include in his suit a prayer to set aside alienations of a date subsequent to that of his own mortgage; for the liabilities of the land are not affected by after-transfers, nor is the validity of such transfers affected by the result of the mortgagee's suit, however much their value may be so (*j*).

A obtained a decree on a simple mortgage bond. B also obtained a decree on a similar bond, and sold the lands in execution. But B's mortgage was subsequent to A's. It was held that A's rights were not prejudiced by the sale, and that he was entitled to have the property

(*h*) S. D. A. 1858, p. 358.
(*i*) S. D. A. 1859, p. 1009.
(*j*) *Supra*, p. 97. S. D. A. 1857, pp. 953, 1063: 1 Hay, p. 106: 2 W. R. p. 21 (Misc.).

re-sold in execution of his decree, free from all subsequent incumbrances. And the fact of A's not having taken out process of attachment against the lands, and not having given any intimation of his mortgage at the time of B's sale, was held not to injure A's right (*k*).

Where the mortgaged property has been sold by the mortgagor subsequent to the mortgage, and the purchaser is a party to the suit, the decree should reserve to such purchaser the right to save the property from sale on his paying off the sum due to the mortgagee (*l*).

If the mortgagee's suit was merely for the recovery of the money due to him, the fact of the decree being silent as to the particular property against which he may execute his decree, does not invalidate his lien. But if the mortgagee has only a decree for the payment of a sum of money, he cannot execute it against the mortgaged property, to the prejudice of a *bonâ fide* purchaser. He is in respect to his decree, in the position of an ordinary judgment creditor and can only seize the rights and interests of his debtor. He may, however, enforce his lien on the mortgaged property by separate suit against the subsequent purchaser in possession (*m*).

In a late case there were two simple mortgages of the same estate. The first mortgagee got a mere decree for payment of what was due to him, the decree not alluding in any way to the estate pledged. In execution of that decree, the property was attached and sold: and the purchaser was put in possession. Subsequently the second mortgagee sued in like manner and got a decree merely for the amount due to him. Then he sued the purchaser under the first decree, praying for a declaration that his (the second mortgagee's) lien was good, and that he was entitled to sell the estate as it stood on the date of the mortgage to him. It was held that the purchaser was entitled to plead and to

(*k*) N. W. P. v. 10, p. 680.

(*l*) S. D. A. 1858, p. 358.

(*m*) 1 W. R. p. 315 (decided by a Full Bench): 2 W. R. pp. 130, 282: 5 W. R. p. 115: 6 W. R. p. 312: 9 W. R. p. 82. See 3 W. R. p. 110 (*sed quære*): 7 W. R. p. 67.

prove the first mortgage,—and that having proved it, he had a good title as against the second mortgagee (*n*).

A person, on borrowing a sum of money, gave his bond for it: and the bond also pledged certain property, providing that any sale or mortgage of it until the lender's claim was satisfied in full, should be invalid. The lender afterwards brought a suit for the money in the Supreme Court and obtained a decree. He attempted to execute his decree, as an ordinary judgment creditor, on the property pledged, but was resisted by some intermediate incumbrancers whom he found in possession. He then instituted a suit in a Mofussil Court to realise the sum which had been decreed to him, by setting aside the intermediate incumbrances, as illegal and contrary to the terms of his mortgage. It was held that, inasmuch as there was an express pledge of the lands to him, and a proviso that any sale or mortgage of them prior to the payment of his debt should be invalid, the mortgagee's having already obtained a decree for money, without any allusion being made to the sale of this particular property in execution, did not effect his lien, and that he was still entitled to bring the mortgaged lands to sale free from any subsequent incumbrances (*o*).

In a case in which the mortgagee had got merely a decree for the payment of money, not alluding at all to the existence of a mortgage, a subsequent decree-holder came in and sold the right and interest of the mortgagor in the property mortgaged. It was held that the mortgagee might still follow the land until his debt was satisfied, but that he could not claim the money realised at the sale in execution of the subsequent decree which had been obtained (*p*). If, however, in such a case as this, the mortgagee wished to follow the land, he would have to get a decree

(*n*) 7 W. R. p. 232.

(*o*) N. W. P. v. 8, p. 316. See 1 Hay p. 266, W. R. Sp. p. 40.

(*p*) S. D. A. 1860. v. 2, p. 35. See S. D. A. 1858, p. 498: S. D. A, 1857, p. 953.

establishing his lien as against the purchaser, if the latter was in possession (*q*).

There is a case, the report of which is not very distinct (*r*), in which it would seem that lands were pledged as security for a debt, and the mortgagee got a money-decree for the amount due to him. In execution he proceeded, not against the mortgaged property, but against other property belonging to the mortgagor. The Court appears to have held that by so doing he barred and destroyed his rights as mortgagee. But the soundness of this decision—if in truth the Court so decided—may be doubted.

It was suggested by the Court in another case (*s*) that where A has mortgages over two properties to secure one debt, and B has a second mortgage of only one of these properties, B has a right to insist that A shall proceed to realise his debt in the first instance from the other property, before attempting to realise it from the property which is subject to B's mortgage. There does not, however, appear to be any case in which this principle has been applied in the case of mofussil mortgages.

When property which is subject to a mortgage, is sold by a third party in execution of a decree which he has obtained, and is sold subject to the mortgage, and there is a surplus after satisfying the decree,—the mortgagee will not be entitled to share in the surplus. This is enacted by section 271 of Act VIII of 1859, a section which refers to a mortgagee who is also an execution creditor. Thus a mortgagee of property which is sold in execution subject to his mortgage, is not entitled to have the surplus proceeds paid out to him in satisfaction of a decree obtained on his mortgage, upon which decree he has issued execution (*t*).

(*q*) 1 W. R. p. 315. See *ante*, p. 164.
(*r*) 3 W. R. p. 16 (Misc.).
(*s*) 7 W. R. p. 483.
(*t*) 6 W. R. p. 13 (Misc.).

An estate was mortgaged to secure the payment of a certain sum. Another estate was by a subsequent deed mortgaged as a further security for the same sum. It was held that the mortgagee might proceed *first* against the estate which was *last* mortgaged to him, if he chose to do so (*u*).

A *talookdar* mortgaged his tenure to his zemindar. Failing to pay his rent, the zemindar sued him under Act X of 1859, and got a decree, and sold the tenure in execution. The auction purchaser got possession. The zemindar then sued and got a decree for the debt due on his mortgage bond, and sought to enforce his decree by again selling the tenure. But it was held that he could not do so: that the sale under Act X of 1859 passed the tenure free from incumbrances: and that the mortgage on it was no longer in existence (*v*).

A mortgagee was in possession under his mortgage, and a subsequent mortgagee (whose mortgage was subject to the first mortgage), got a decree, quite properly, to sell the property but subject to the first mortgage. In execution of this decree, peons and other officers of the Court went and took actual possession in order to attach the property as a step towards judicial sale. Their Lordships of the Privy Council held that this was illegal, that no actual seizure should have been made, and that the proper course was to issue and publish a written notice under sections 235 and 239 of Act VIII of 1859 (*w*).

There does not seem to be any objection to a mortgagee becoming himself the purchaser of the land, for the sale of which he has obtained an order, so long as no case of fraud or collusion is made out against him (*x*). In England, this is not so: there, a mortgagee can become the purchaser, only by special leave of the Court (*y*).

(*u*) S. D. A. 1858, p. 1176.
(*v*) 3 W. R. p. 217.
(*w*) *Mudhun Mohun Doss* v. *Gokul Doss*. 10 Moore's Ind. Ap. p. 563, 5 W. R. p. 91 (P. C.).
(*x*) N. W. P. v. 6, p. 218.
(*y*) Daniel's Chancery Practice, p. 1196.

II. In a case of mortgage by bye-bil-wufa, kut-kubala, or conditional sale, foreclosure cannot be obtained until certain forms prescribed by law have been gone through; and these forms must be very strictly complied with, any failure in this respect proving fatal to the whole proceeding.

The law on this subject is thus summed up by the Privy Council in the case of *Forbes* v. *Ameeroonissa* (z), in which their Lordships state what is the law of foreclosure, as established by the Regulations and the practice of the Courts in Bengal:—"Up to the year 1806, the rights of the holder of a bye-bil-wufa were enforceable according to the strict terms of the contract. It was necessary for the mortgagor, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I of 1798, within the stipulated period for the repayment of the loan. Regulation XVII of 1806 first introduced a modification of the strict rights given by the contract, analogous to, though by no means identical with that which Courts of Equity have long imposed on mortgagees in this country. The 7th section of that Regulation extended the period within which the mortgagor might redeem, to any time within one year from and after the application of the mortgagee to the Zillah Court under the following section. And that section, being the 8th, provided that a mortgagee, desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the zillah judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him, that if he did not redeem the property in the manner provided by the preceding section within one year from the date of the notification, the mortgage would

(z) 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

be finally foreclosed and the conditional sale made absolute. Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take, within the year, the steps towards redemption which are prescribed by the 7th section. Within that period, he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to section 2 of Regulation I of 1798. That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be:—'When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases, the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the land, if that is in the possession of the lender, subject to the adjustment of the accounts.' A third case is then provided for as follows:—'If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered

to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him.' The 3rd section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary. The general effect of the Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be, whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had then been made. If that is found against the mortgagor, the right of redemption is gone."

The first thing (*a*) to be done by a mortgagee by conditional sale wishing to foreclose, that is to say, to have the sale to him declared absolute, is to demand payment

(*a*) Reg. XVII. 1806, Sec. 8.

of what is due on the mortgage, from the borrower or his representative. And it is not necessary that the demand should be for the specific sum ultimately ascertained to be due (*b*). If the application is unsuccessful, he must present, by himself or by one of the authorised vakeels of the Court, a written petition to the judge of the zillah or city in which the mortgaged property is situated, stating that the petitioner is mortgagee by conditional sale of the property in question, that a certain sum is due to him for principal, with a sum for interest and costs, that the petitioner has made demands for payment but without effect, —and that therefore he wishes to have his sale made absolute, to be put in possession, and to be registered as proprietor.

On receiving this petition, the judge will cause the mortgagor or his legal representative to be furnished as soon as may be with a copy of it, and also with a notice or perwannah under his seal and official signature, notifying to him, that if he does not redeem the property mentioned in the petition within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale made absolute.

The judge will act upon the petition of one who professes to be the mortgagee of property within his jurisdiction, without making any inquiry as to the truth of its contents, or even as to the existence of a mortgage at all. And the production of the original deed of mortgage, prior to the issue of notice of foreclosure, is not necessary (*c*). Nor need the mortgagee produce his accounts in these preliminary proceedings (*d*). But a judge may if he pleases satisfy himself, by requiring the production of the document, that the applicant for foreclosure is the "receiver or holder of a deed of mortgage" (*e*).

(*b*) *Forbes* v. *Ameeroonissa*. 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

(*c*) Rep. Sum. Cases, 8 Sept. 1840.

(*d*) *Forbes* v. *Ameeroonissa*. 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

(*e*) Cir. Or., 5th June 1848, No. 46.

A copy of the mortgagee's application to foreclose, must accompany the notice issued by the judge to the mortgagor or his representative; but it is not required, that he should be served with a copy of the mortgage agreement (*f*).

It has been held that when the mortgagee had been some years in possession after foreclosure, the mortgagor having full notice of the fact, the mortgagor could not come in and redeem on the ground of the proceedings being irregular inasmuch as a copy of the mortgagee's petition was not served along with the notice. The irregularity was taken to have been waived (*g*).

The notice from the judge to the mortgagor must issue from the court of the district in which the mortgaged property is situated at the time of issue: and if this rule is not attended to, all the subsequent proceedings will be bad (*h*). But it appears that when the lands lie in several zillahs, a notice applicable to the whole lands, but issued from only one of the courts which have jurisdiction, is sufficient; and it is not necessary either that a separate notice should issue from each one of the courts, or that leave should be obtained from the High Court to issue one notice which may suffice for all the property in dispute. In the case of *Rasmuni Dabee* v. *Pran Kishen Das* (*i*), the mortgage deed on which the suit was founded, described the whole lands as situated in zillah Moorshedabad, and out of the Court of that zillah notice of foreclosure was issued. The Collector was a party to the suit, and objected that part of the lands being in zillah Beerbhoom, the notice was incomplete. To this the mortgagee pleaded an order, of date subsequent to the notice, obtained by him from the Sudder Court, for the trial of the cause in the Court of Moorshedabad. Upon these facts, the Privy Council in giving judgment remark: "What is there to show in the

(*f*) Cons. 630, 11th March 1831.

(*g*) W. R. 1864, p. 36.

(*h*) S. D. A. 1847, p. 485. Reg. XVII. 1806, Sec. 8.

(*i*) 4 Moore's Ind. Ap. p. 392. See S. D. A. 1859, p. 848.

whole course of these proceedings, that these lands were not situated partly in one, and partly in the other district; and what is there to show in the course of the proceedings, that if that were the case, an order (*i. e.* notice of foreclosure) made in the court of either district, would not be a proper order? We think that there is nothing in this case to show that the order was not made in a proper Court."

Judges are required to pay particular attention to prevent any unnecessary delay in issuing these notifications; and in justice to mortgagees, as well as in conformity with the Regulations, they should be issued as soon as possible after the receipt of the application for foreclosure. The mortgagee therefore, on filing his application, should be directed immediately to deposit the *tulubanah* of the peon through whom the notice is to be issued to the other party, that the order for issuing the same may be passed without delay. The order for issuing the notice must be passed after the deposit of the *tulubanah* of the peon by whom it is to be served (*j*).

The period of one year, during which the mortgagor may redeem, must be calculated from the "date of the notification" (*k*). And the notification is to bear date on the day on which it is actually issued,—that it is say on the day on which it is put into the hands of the Court peon for service,—and not on the day on which the order for its issue is passed: but in computing the year, the date of issue is to be excluded (*l*). To this rule, that the year is to be calculated from the date of issue, there is no exception; and no local custom can prevail against it (*m*).

It must be particularly observed, that the year allowed by law, counts from the date of issue of the notice, not from the date of *service* on the mortgagor. Thus, the date of issue being the 28th May 1841, and the date of

(*j*) C. O. 9th April 1817, para. 3: Cons. 644, 24th June 1831: N. W. P. v. 7, p. 60.

(*k*) Reg. XVII. 1806, Sec. 8.

(*l*) 9 W. R. p. 116. S. D. A. 1858, pp. 627, 1477. See S. D. A. 1856, p. 818: 6 Sel. Rep. p. 166.

(*m*) 6 Sel. Rep. p. 166: S. D. A. 1847, p. 270.

service the 17th June, the year counted from the 28th May (*n*). So that it would seem, according to these decisions, that if the notice of foreclosure is not *served* on the mortgagor until the last day of the year of grace, he will have no time at all left him for redemption.

Referring, however, to the very inequitable results which may flow from the rule which the Sudder Court laid down, *Phear J.*, after quoting section 8 of Reg. XVII 1806, says (*o*),—"From this I understand that the commencement of the final year of grace dates with the alternative of a notice either to the mortgagor or to his legal representative; and that, if neither alternative has happened, the year of grace cannot have begun to run. And, although the judge is the instrument to give the notice, the mortgagee, who desires to make it the basis of a forfeiture by the mortgagor of the equity of redemption, must take care to put the Court in motion for the purpose, and cannot claim his strict legal rights while the notice, from whatever cause (excepting only the fault of his adversary), remains unissued. I may remark that I employ the term 'issuing of notice' as synonymous with the word 'notification' which is used in the Regulation, because a decision of the late Sudder Court (reported in 7 Select Reports, page 264) judicially declares that it is so. At the same time I desire to say that in my judgment, this is not only an unnatural and forced construction of the word 'notification' as used in the Regulation, but is also directly contrary to all principles of equity and good conscience, by which I conceive the Courts ought to be guided when called upon to give effect to an enactment which the Legislature has made for the express purpose of creating for, and securing to, a mortgagor equitable rights beyond, and even in contradiction to, the strict letter of his contract. The result of this most unnecessary construction in any particular case may well be, that, notwithstanding

(*n*) 7 Sel. Rep. p. 264.

(*o*) 3 W. R. p. 230: and see 9 W. R. p. 116.

the Regulation, and without laches of his own, the unfortunate mortgagor gets none of the equity of redemption which was intended for him."

The date of *original* issue, and not the date of any second or later issue,—as by the Sheriff, to whom the serving of the notice was entrusted,—is the period from which the year is to be calculated (*p*).

Notice is to be given to the mortgagor or "his legal representative." These words are very strictly construed by the Courts, and great care must be taken that all the proper parties have had notice.

Notice to the person who on the face of the deed appears to be the mortgagor, or to his representative, is all that is required: and a change during the year of grace, in the parties entitled to redeem, does not make any further notice necessary. Thus if *after* notice has been duly served on the mortgagor he transfers his interest, no fresh notice need be given to the transferee (*q*). So, if *after* due service of the notice, the mortgagor on whom it was served becomes insolvent and files his schedule in the Insolvent Court, no further notice is necessary (*r*). When A mortgaged land, B witnessing the deed, but being in reality a co-mortgagor with A, it was held that notice to A was sufficient, although the petition and plaint of the mortgagees, showed they were cognisant of the fact that B also was in truth a mortgagor (*s*). So it would seem that A having mortgaged lands in the name of his son B, notice to B would be considered sufficient: and that this notice, having been served during A's life-time, would be binding upon other parties who, along with B, had on A's death during the year of grace become his "legal representatives" (*t*).

It has been ruled that a purchaser at a public sale of the mortgagor's right, is the mortgagor's "representative,"

(*p*) 7 Sel. Rep. p. 264.
(*q*) S. D. A. 1857, p. 957.
(*r*) S. D. A. 1858, p. 323.
(*s*) S. D. A. 1849, p. 36. See S. D. A. 1856, p. 923.
(*t*) S. D. A. 1852, p. 423.

so as to be entitled to notice: but it can scarcely be said to have been finally settled that a purchaser by private sale is so also.

When the mortgagor had sold his interest by private sale, and the purchaser was in possession, it was held that notice to the mortgagor was sufficient, without notice to the purchaser (*u*). And guided apparently by this decision, the Agra Sudder Court held that a purchaser by private transfer from the mortgagor is not entitled to notice, and that a mortgagor has no power to constitute a private purchaser his legal representative in a mortgage contract, as the mortgagee's engagement is with the mortgagor, and with him alone. But the Court at the same time decided, that a purchaser who comes in under a title derived from a public sale, is on a different footing, and is as much the "legal representative" of the mortgagor, as the natural heir; that notice must be served upon him; and that no analogy exists between a private sale and a compulsory transfer, carrying with it *primâ facie* a valid title at law (*v*).

The Calcutta Sudder Court however subsequently expressed its dissent from the doctrine laid down in these two cases, and declared that the purchaser *out and out* of a mortgagor's title, whether by public or by private sale, is his legal representative, and must be served with notice (*w*).

In a later case in which the same question was raised before the High Court, it appeared that the equity of redemption had not in fact been assigned to the purchaser until after notice of foreclosure had been served on the mortgagor, and therefore the assignee had no right to notice. But the Court said that even if the assignment had taken place before the issue of the notice, the assignee was not entitled to notice (*x*). Still more recently, however, it was declared, and no doubt rightly, that notice

(*u*) S. D. A. 1847, p. 499.

(*v*) N. W. P. v. 6, p. 210: v. 9, p. 1: and see v. 9, pp. 371, 421: also S. D. A. 1854, p. 1.

(*w*) S. D. A. 1853, p. 859.

(*x*) Marsh. p. 292.

ought to be given to every one who (by whatever means) had come, *before* the issue of notice, to occupy the position of the mortgagor relative to the mortgagee, in respect of the property the subject of the mortgage. It was said by one of the learned judges (*y*) "Next then comes the question—what is the meaning of the term 'mortgagor's legal representative?' I conceive the words naturally designate that person who, either by law or by contract between the parties, succeeds the mortgagor, whether mediately or immediately, in the position which he holds relative to the mortgagee in respect of the property which is the subject of the mortgage; and with this view I believe all the published decisions of this Court accord, as well as those of the late Sudder Court. Now a succession of this kind may occur either by reason of the death of the mortgagor, or by assignment of the equity of redemption, as a consequence of insolvency, execution of a decree of Court, or voluntary contract: only it should be observed that in the latter cases the assignment must not be inconsistent with the terms of the original mortgage, and must generally be assented to by the mortgagee, or, in other words, must be such as the mortgagee is bound to recognize. When the mortgagee desires to foreclose, there can never be the least practical difficulty in ascertaining whether the equity of redemption as against the mortgagee, is in the hands of the original mortgagor himself, or in those of one of the substitutes for him just described; and in whichever of these it is found to be, to that one, in my judgment, the notice must be issued in order to initiate the year of grace, whether it was by public or private sale, or otherwise, that the assignee in question obtained his right to the assignment. But when once the time of grace is set running, no subsequent assignment of the equity of redemption will stop it. If, therefore, in the case before us, the equity of redemption was duly and completely assigned in such a way as to bind the mort-

(*y*) 3 W. R. p. 230, *per* Phear, J.

gagee *before* the notice of foreclosure, then the notice is not sufficient, which has not been issued to the assignee; but, if the assignment took place *after* the notice to the mortgagor, then no notice to the assignee is necessary, and the mortgagee ought to have the benefit of his proceedings."

A similar view was taken by a Division Court in another case (z). The Court said:—"Even if the heirs of the mortgagee had sued to foreclose or to establish their lien on the lands, it is clear that no step which they could have taken against the mortgagor alone, would have had the effect of barring the present plaintiff, as a purchaser of the rights of the mortgagor. They could not conclude and bar him without giving him an opportunity of asserting and protecting his rights. The general principles applicable to the subject will be found in Story on Equity pleading, (sec. 193, and *note* 1, p. 213.) We do not mean to suggest that in foreclosure proceedings, and suits to establish the lien of a mortgagee and to bring the property to sale in satisfaction of the mortgage, which are somewhat in the nature of proceedings *in rem*, it is in all cases necessary to serve subsequent incumbrancers, not in actual possession of the property, with notice, or to make them parties. But we are disposed to think that in some of the cases which have come before this Court, and the late Sudder Court, sufficient consideration may not have been given to their rights."

There is no doubt that any mortgagee who is aware of the fact that the mortgagor has made an assignment (whether by way of sale or of mortgage) of his equity of redemption, will do well to issue notice of foreclosure to the assignee as well as to the mortgagor himself,—if he wishes to make sure of his notice being sufficient. That this is so, is apparent from the cases last referred to; notwithstanding the older class of decisions to the effect that the procedure of the Courts does not require or admit of the

(z) 6 W. R. p. 230.

issue of a notice of foreclosure to a second or other subsequent mortgagee (*a*), and that when a second or later mortgagee intends to foreclose, it is sufficient if he gives notice to the mortgagor or his legal representative, without serving or giving any intimation to a prior mortgagee, even although such prior mortgagee is in possession (*b*).

When the mortgagor's representative was a minor, and notice was served on certain persons who were believed to be, but who were not in fact, his guardians, the notice was bad (*c*). A mortgagor by deed directed that his widow should possess his zemindary (half of which was under mortgage), and enjoy it during her life-time: he granted permission to her to adopt a son, and directed that on her death, such adopted son should inherit all his property: and he desired her to pay off his mortgage debt, by selling or mortgaging any portion of his zemindary. Under this authority, the widow did adopt a boy as son to her deceased husband. The adopted son was a minor, and under the guardianship of the widow. Service of notice of foreclosure on the widow, was held to be sufficient, without notice to the son (*d*).

When the estate is under the control of the Court of Wards, by which a guardian and manager is put in possession, notice ought to be served on such guardian and manager; and the Collector of the district, as representing the Court of Wards, should be a party to the proceedings. If a new manager or guardian is appointed after issuing the notice, he must be substituted for the original one in all future proceedings (*e*).

It is very doubtful what the exact nature of the "notice of foreclosure" is: that is to say, whether it is a notice

(*a*) S. D. A. 1853, p. 859: 1856, p. 948. See N. W. P. v. 8, p. 304. *Supra* pp. 106—109.

(*b*) See S. D. A. 1847, p. 499: N. W. P. v. 8, p. 304.

(*c*) N. W. P. v. 6, p. 278.

(*d*) *Ras Muni Dabee* v. *Prankishen Das*, 4 Moore's Ind. Ap. p. 392.

(*e*) *Ibid.* And see *Prannath Roy Chowdry's* case, 7 Moore's Ind. Ap. p. 323.

which requires to be served upon every person who has the right of redemption, or whether it is a mere proclamation which, even although the right of redemption may be vested in more than one class of persons, need be served only upon the mortgagor or the person or class of persons coming under the head of the mortgagor's "legal representative." The intention apparent from the Regulations is that all those who have the right of redeeming should be served,—the question as to who those are, being left open (*f*). The tendency of many of the decisions of the Courts, however, has been to treat it as a mere proclamation.

Personal service on the mortgagor of the notice of foreclosure, is not absolutely necessary, if due efforts have been made to serve him (as by affixing the notice on his dwelling-house or the like), but have proved ineffectual. This was so decided by the Agra Sudder Court (*g*). And the Calcutta Court went still further, in a case in giving judgment in which it was said,—"All that is required is, that the mortgagor shall be made aware, through the Court, that an application of foreclosure has been made, and a year's grace is given him to fulfil his contract with the mortgagee. * * * * To us, it appears that personal service must of course be held to be good; failing that, notice to the mortgagor by any other means is equally good, without actual service on him. The duty of the Court is to serve notice, or to use its best endeavours to give information to the mortgagor of the foreclosure. If upon duly certified returns to the Court by the serving officer it should be proved that every attempt to serve or give notice was unsuccessful, the mortgagee is entitled to bring his action for possession after the lapse of the year of grace, calculated from the date of the issue of the notification through the officers of the Court" (*h*).

(*f*) See *Supra*, pp. 106—109.
(*g*) N. W. P. v. 8, p. 400: 1855, p. 8.
(*h*) S. D. A. 1854, p. 281. So, 1860, pp. 34, 38.

The question of the sufficiency of the service of a notice of foreclosure having come before the High Court (*i*), the judges made the following remarks:—"We may observe that by the sections now under consideration, the notification is not merely a preliminary proceeding leading up to a judgment of foreclosure to be subsequently pronounced in Court. It not only fixes the date from which the period during which the mortgagor is to retain the right to redeem, is to be computed, but it is of itself the operative act in the foreclosure proceeding. We think, therefore, that the service of the notice must be evidenced by the clearest proof, and must in all cases be, if not personal, at least such as to leave no doubt on the mind of the Court, that the notice itself must have reached the hands, or come to the knowledge of the mortgagors. Not only do we find from the evidence of the witnesses that the notice was not duly served, but we find that, up to the present time, the mortgagee has continued to pay in the Government revenue in her capacity as mortgagee, and designated herself as such in her *chalans*. Now, had the foreclosure been actually completed, it is most improbable that she would have failed to have had her name entered as proprietor in the Collector's Register." And the Court held that there had been no sufficient service of the notice of foreclosure.

A case was remanded to the zillah judge, because he had not given a sufficiently full and explicit opinion on the plea of the defendant that the notice had not been duly served, inasmuch as it had only been stuck up on the door of his (the defendant's) house (*j*).

In one instance, in which the notice was returned with a report that as the parties named in it could not be found, a proclamation had been affixed at the judge's cutcherry and the residence of the parties,—this was reckoned to be insufficient; and it was said that the strict letter of the Regulation must be followed, and that the

(*i*) W. R. 1864, p. 49. (*j*) S. D. A. 1852, p. 557.

Regulation did not provide for the substitution of a proclamation, in such a case (*k*). Apparently, however, it was not proved that any very great effort had been made to serve the mortgagor personally: at any rate, this case is over-ruled by the later decisions cited above.

Nine out of eleven sharers made a mortgage of the whole joint property. The remaining two afterwards gave their consent in writing to the mortgage. Notice of foreclosure was served on the *nine* only. But it was held that this was, under the circumstances, sufficient notice to *all* the eleven (*l*).

The mere fact of cognizance on the part of the mortgagor, or his representative, that his property is liable to foreclosure, or cognizance of the steps which the mortgagee has been taking, will not absolve the mortgagee from the necessity of strict compliance with the requisitions of the law as to issuing and serving the notice of the application to foreclose (*m*).

On the whole it would appear still, that if the mortgagor or his representative cannot be found and is really *bonâ fide* absent, and ignorant of the issue of the notice, foreclosure can be completed in his absence, and without his being in the least aware of the proceedings which are being taken against him, if the mortgagee has done all that could be done to effect service. This, in fact, is merely carrying out fully the rule, that the year of grace counts from the *issue* of the notice, not from its *service* on the mortgagor.

The objection that notice has not been duly issued is by no means a *technical* objection (*n*).

The notice to redeem, gives no efficacy to transactions not in themselves legal, and the non-appearance of the mortgagor within the prescribed year, does not bar him from disputing the contract, or from proving it to be void

(*k*) N. W. P. v. 6, p. 278. See S. D. A. 1858, p. 1775.

(*l*) S. D. A. 1854, p. 511.

(*m*) N. W. P. v. 6, pp. 210, 278.

(*n*) S. D. A. 1858, p. 1775.

or voidable (*o*). The mortgagee must establish his case like any other plaintiff.

Notice under sec. 8, Reg. XVII 1806 being issuable on application, without any sort of inquiry into the merits of the case, and without any intimation being given to the supposed mortgagor of the intention to make such application, no publicity can be considered to attach to its issue. And the fact of a man's having caused notice of foreclosure to be issued, is not in any way to be taken even *primâ facie* as affording a presumption of his good faith (*p*). And the mortgagee's having served an occupant of the mortgaged lands with notice, is no admission of that occupant's right to redeem (*q*).

Notice of foreclosure having been issued, the mortgagor or his representative must take care, within the year of grace, to tender to the mortgagee, or to deposit in Court (which is always the safer plan), the whole amount of principal and interest, or if the mortgagee has had the usufruct of the land, the amount of the principal only which is due. If no rate of interest has been agreed upon, it must be deposited at the rate of 12 per cent.; and no local custom can make a deposit at a lower rate of any use (*r*).

The principal debt and interest due are all that need be deposited within the year of grace. It is not essential that costs incurred by the mortgagee in the matter of the mortgage should also be deposited (*s*).

It has been already shown that the tender must be made in money, but that if the mode of re-payment agreed on in the original contract is more favorable to the mortgagor than that provided by the Regulations, a tender

(*o*) 5 Sel. Rep. p. 81: S. D. A. 1851, pp. 211, 648: Cons. 1140, (W. C. 2nd) Cal. C. 23rd March 1838.

(*p*) S. D. A. 1848, p. 36.

(*q*) *Prannath Roy Chowdry's* case, 7 Moore's Ind. Ap. p. 323.

(*r*) Reg. I. 1798, sec. 2. S. D. A. 1859, p. 284.

(*s*) Marsh. p. 167.

made according to the contract is sufficient (*t*). Thus nothing being said in the mortgage deed as to interest, a deposit of the bare principal was held sufficient (*u*). But whatever stipulations to the contrary have been made, a tender or deposit in strict compliance with the terms of the Regulations, is all that is necessary. Therefore where the mortgagee had been in possession, a deposit of the principal was held sufficient to prevent foreclosure, although the mortgage deed contained a covenant that the mortgage should be foreclosed, unless certain sums due for improvements, as well as the principal sum lent, were paid off within the year of grace (*v*).

Where it had been agreed between the parties, that a sum due from the mortgage should be set off against so much of the mortgagee debt, a deposit by the mortgagor of what remained due from him, after making the deduction, was held to be sufficient. But a mortgagor who makes a tender of this sort runs a very great risk, and ought be very sure of his ground before he does so. For if the sum tendered or deposited falls short, though it be only to the extent of one rupee, of the amount due, the mortgagor's right is, on the expiry of the year of grace, wholly gone (*w*).

The general principle of the Regulations is this, that if any thing be due on the mortgage, and the mortgagor makes an insufficient deposit,—and *a fortiori* if he makes no deposit at all,—the right of redemption is gone at the end of the year of grace (*x*).

The tender or deposit must be made within a year from the date of the issue of the notice of foreclosure. But if the last day of the year of grace happens to be a Sunday or other holiday, a deposit on the first ensuing business

(*t*) *Supra*, p. 124. Reg. XXXIV 1803, Sec. 14.

(*u*) W. R. 1864, p. 157.

(*v*) N. W. P. v. 8, p. 161.

(*w*) N. W. P. v. 8, p. 447. See v. 10, p. 580: S. D. A. 1859, pp. 127, 842: Marsh. p. 45.

(*x*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

day will be sufficient (*y*). In one case the last day for payment was the 25th of November. On that and several subsequent days, the Court was improperly closed by the judge on account of the Sonepore Fair. It was held (*z*) that the mortgagor saved his estate from foreclosure by depositing the money in Court on the first day on which the Court was open after the 25th of November. It was held also that the mortgagor was under no obligation to make a private tender on the 25th of November of the amount due. This was a case in which the mortgagee had given an extension of time. But the same rule would apply when the Court was improperly closed on the last day of the year of grace.

The judge has no discretion to extend the time given to the mortgagor by section 8 of Reg. XVII 1806: and an order of the judge giving the mortgagor four months additional time was set aside by the High Court (*a*). But when the mortgagee has himself granted an extension of time a deposit or payment made before the expiry of the time so extended is sufficient (*b*).

When a sum of money is brought for the purpose of being deposited in Court, it ought to be received whatever its amount, and its receipt should be notified to the mortgagee. Under sec. 2, Reg. I 1798 it is the duty of the judge when money is deposited himself to grant a receipt for it to the mortgagor, and to issue notice to the mortgagee that the money has been deposited (*c*). It is irregular for the Court to make a report as to the insufficiency of the tender, and the amount required (*d*).

The tender or deposit must be made unconditionally, and if it is fettered with any restrictions, it is bad,—as

(*y*) N. W. P. v. 10, p. 580: v. 7, p. 60. S. D. A. 1858, pp. 627, 1477: Rep. Sum. cases, 15th July 1841: Sevestre's Rep. 27th April 1840: 7 Sel. Rep. p. 264.

(*z*) 8 W. R. p. 223.

(*a*) 5 W. R. p. 31 (Misc.).

(*b*) Marsh. p. 167: 8 W. R. p. 223.

(*c*) 8 W. R. p. 223.

(*d*) N. W. P. v. 10, p. 580.

was held in a case where the deposit was accompanied by a denial of the mortgagee's title, and notice that a suit would be brought to recover back the money tendered (*e*).

The mortgagors some weeks before the expiry of the year of grace, applied for leave to deposit the money in Court, subject to a condition, that it should not be paid to the mortgagee, but should be kept in Court, until a regular suit disputing his claim could be brought; the judge gave the permission asked for, and received the money so conditionally deposited. The day after the year of grace came to an end, the judge called upon the mortgagors to take away their money, remarking that such a conditional deposit was not allowable; and he afterwards declared the conditional sale to have become absolute, because the money had not been paid or deposited within the year. On appeal, the majority of the Court held that there was no sufficient deposit, and that the acts of the judge formed no bar to the foreclosure of the mortgage (*f*).

So, when the mortgagor restrained the payment to the mortgagee of money deposited, until the result of a redemption suit which he was about to bring, should be seen, and the year of grace expired without any unconditional deposit being made, and the redemption suit failed, the mortgage was declared foreclosed as if there had been no deposit (*g*).

A mortgagee demanded a larger sum than was really due to him. The mortgagor paid into Court the sum he asked for, stating that he did so merely to obviate all objections, and not as admitting it to be due. The mortgagee having taken it all out of Court, the mortgagor

(*e*) *Prannath Roy Chowdry's* case, 7 Moore's Ind. Ap. p. 323: 6 W. R. p. 225 (the decision of a Full Bench over-ruling 3 W. R. p. 184). See also Marsh. p. 45, W. R. Sp. p. 14.

(*f*) S. D. A. 1847, p. 462.

(*g*) S. D. A. 1848, p. 897.

sued for and recovered what he had taken in excess of that to which he was entitled (*h*).

The tender or deposit ought to be made in one sum, not by instalments; at least, it is to the mortgagor's advantage to pay in one sum, as his position is in no way benefited by the payment of any thing less than the whole amount due: and if he chooses to make several deposits on different dates, he will not be allowed interest on any of them, except from the date on which the demand was discharged in full, and due notice given to the mortgagee. The mortgagee is not obliged to receive sums deposited on account, until the whole is paid in; he defeats his own claim by accepting them, as his taking out of Court a sum paid in by the mortgagor, is an acknowledgment that such sum is in full discharge of all monies due in respect of the mortgage debt (*i*).

If the mortgagor admits the claim of the mortgagee, and has not the means of paying what is due to him, he may put him in possession of the property, and without waiting till the end of the prescribed year, present a petition to the Court from which the notice issued, stating his inability to pay, and that he has made over possession to the mortgagee. And such a proceeding, if possession is actually given to the mortgagee, has apparently the same effect as a decree for possession on foreclosure, made in a regular suit. It has, however, been doubted whether a *bonâ fide* purchaser, who had purchased from the mortgagor before the presentation of the petition, might not, notwithstanding, redeem at any time during the year of grace. And if possession is not delivered over to the mortgagee, the mortgagor's having filed such a petition, will not bar the right of any one who under ordinary circumstances would have been entitled to redeem, except that the mortgagor himself would probably be held to be bound by his own act, and to be foreclosed (*j*).

(*h*) S. D. A. 1855, p. 54.
(*i*) N. W. P. v. 7, p. 60.
(*j*) S. D. A. 1849, p. 311.

In like manner, the mortgagor, without any proceedings whatever being taken in Court, may convey absolutely to the mortgagee, the property already conveyed to him conditionally. But in such a case, the mortgagee must be careful to obtain sufficient proof of the sale having been made absolute: and he ought to have his name at once registered in the Collector's books as proprietor, and should not allow it to remain there as mortgagee (*k*).

It is not, however, absolutely necessary that there should be any written agreement, in order to convert a conditional into an absolute sale, even though the conditional sale itself was in writing: any thing which proves that the mortgagor has agreed to the sale being made absolute, is sufficient. A suit was brought for possession of land which had at first been conditionally sold to the plaintiff, but which, it was alleged, had been afterwards absolutely conveyed to him. The plaintiff did not prove any positive contract making the sale absolute, but he produced from his own custody, the ikrars given by him to the defendant, declaring the sale to be only conditional, and he gave evidence to the effect that these had had been delivered up to him by the defendant, on the payment to him of a further sum of money. It was decided, that the return of these ikrars afforded conclusive evidence of an unconditional sale, and that, therefore, the plaintiff must have his decree (*l*).

But a mortgagee ought for his own security either to insist upon having a regular decree of Court declaring the mortgage foreclosed, which undoubtedly gives him by far the safest title, or, if he chooses to have the sale made absolute without going into Court, he should see that the conveyance to him is made by a deed properly executed and attested.

If the mortgagor, or his representative, makes a tender

(*k*) N. W. P. v. 8, p. 273. See S. D. A. 1856, p. 948. W. R. Sp. p. 79.

(*l*) 7 Sel. Rep. p. 181: 2 Agra, p. 176. But see W. R. Sp. p. 79.

or deposit within the year of grace, it remains for the mortgagee to consider whether or not he will accept of the sum so tendered or deposited. He will accept of it only if it covers the whole of his demand, as he cannot take it out in part payment and continue his suit for foreclosure, or for payment of what remains due.

If the mortgagee takes the money out of Court, he cannot draw back afterwards on the ground that the money was deposited after expiry of the year of grace,—or on any other ground (*m*).

If the mortgagee is ready to receive the sum deposited, the judge in whose Court it has been placed will immediately pay it over to him; if he refuses to receive it, the judge will restore it to the person who deposited it. The mortgagor who has tendered or deposited a sufficient sum, or a sum which is accepted as sufficient by the mortgagee, being in exactly the same position as one who has come forward to redeem and made a deposit or tender for that purpose under Reg. I of 1798, sec. 2, is entitled to possession summarily without suit (*n*). And the mortgagee, on applying to take the money out of Court, must surrender the mortgage deed, or show satisfactory cause for his not doing so (*o*).

Up to this point, the functions of the judge, in proceedings taken for foreclosure, are purely ministerial (*p*), he having merely, without instituting any inquiries into the merits of the case, or expressing any opinion as to them, to issue on the application of the parties certain fixed notices and orders,—to receive, and pay over to the mortgagee if desirous of taking it, whatever amount may be paid into Court by the mortgagor, or if the mortgagee should refuse to accept the same, to restore it to the mortgagor,—and to receive proof of service of the several

(*m*) 6 W. R. p. 249.
(*n*) Cir. Ord., 22nd July, 1813.
(*o*) See 7 Sel. Rep. p. 260: and *supra*, p. 135.
(*p*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

notices. And it is the duty of the judge strictly to confine himself to recording simply the facts which have occurred during the summary process, and to abstain from expressing any judicial opinion whatever on the proceedings. All questions as to their effect or as to the legality or validity of the alleged mortgage, or even as to the existence of a mortgage at all, must be left undecided at this stage, and form the subject of a regular suit to be subsequently instituted (*q*). But so far as the mere issue and service of the notice are concerned, he is to inquire and record judicially that all has been done properly (*r*).

After the lapse of the year of grace, in the event of the proper sum, or such a sum as is accepted by the mortgagee, not being deposited or tendered, the mortgagee who wishes to complete the foreclosure must institute a regular suit to have the conditional sale declared absolute, or, if he has not had the usufruct, for possession of the mortgaged land, as on a conditional sale become absolute (*s*). And he must not sue merely for possession as mortgagee, but for possession as absolute proprietor by reason of foreclosure having taken place (*t*).

To succeed in his suit, the mortgagee must prove that all the legal formalities have been observed, that notice was issued from the proper Court, that it was duly served on the right parties, that the period of a year from the issue of it has elapsed, and that no sufficient tender or deposit was made before the expiration of the year of grace. Without proving all these points he cannot obtain a decree, whether the defendant pleads that there has been any irregularity or not,—not even if the case is tried *ex parte*. If service of the notice is denied, it must be proved independently of the mere copy of the foreclosure pro-

(*q*) Cir. Ord. 22nd July, 1813: 17th January, 1834. *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C).

(*r*) 7 W. R. p. 123.

(*s*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

(*t*) N. W. P. v. 9, p. 234.

ceeding. Witnesses must be called to prove the service (*u*). The Court is not justified in overlooking any error in the summary proceedings, although its attention is not called to it by the parties most interested (*v*). So also the mortgagee must establish that, on the merits of the case, he is entitled to what he claims: for, as has been seen above, the mere issue of notice, and the proceedings in connection therewith, give no sort of validity to his claim, and if he cannot show a good title as mortgagee, his suit must be dismissed (*w*).

The mortgagor's not coming forward in Court, or taking any steps to protect himself during the year of grace, does not in any degree debar him from appearing in the mortgagee's suit for possession, and raising any plea on the facts and merits of the case: and the judge is bound to investigate and decide the case on its merits, notwithstanding that no objections to the conditional sale are preferred till more than a year after the date of notice of foreclosure (*x*). But any defence which the mortgagor sets up must be one which existed prior to the expiry of the year of grace,—the one great question in all foreclosure suits being, whether the mortgagee was on that date entitled to foreclose or not. With that year ends the mortgagor's whole interest in his property, unless he can prove that previous to its lapse he was entitled to have it declared by the Court that the mortgage had been redeemed.

If the mortgagor takes no steps to redeem within the year, from the knowledge that the debt has been fully paid, and that therefore the mortgage cannot be foreclosed, he must nevertheless appear and defend a suit brought

(*u*) 1 Agra, p. 172. See 3 W. R. p. 11 (Misc.).

(*v*) 5 Sel. Rep. p. 346: S. D. A. 1847, p. 485: 1853, p. 221.

(*w*) *Supra*, pp. 184, 185. Sel. Rep. p. 81: S. D. A. 1851, p. 648. See 1 Agra, F. B. p. 102.

(*x*) S. D. A. 1848, p. 6: 1851, pp. 211, 648: *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.); and see 6 W. R. p. 69.

by the mortgagee to have the sale declared absolute and to obtain possession. If he does not do so, and a decree is made against him, it will be binding on him until he brings a fresh suit and has it set aside.

When the contract was made before the passing of Act XXVIII of 1855, the lender on a mortgage by conditional sale, who has been in possession and in the enjoyment of the usufruct of the land, must account to the borrower for the proceeds of the estate whilst in his possession. But an account is not necessary to be taken in *every* such case: for example, it need not be taken if it is admitted on the face of the mortgagor's answer that something is still due from him. The obligation to account depends on the circumstances of the case and the nature of the issue raised (*b*). The rule that the mortgagee must account, does not, however, apply to the mortgagee's possession after the lapse of the year of grace, if the notice issued is followed within twelve years from the time when the mortgagee could first have sued, by a suit for foreclosure (*c*).

Therefore in such cases, in a suit by a mortgagee to render absolute a conditional sale, the mortgagor may plead that prior to the expiry of the year of grace, the amount borrowed, together with the legal or stipulated interest, had been realised by the mortgagee from the usufruct of the property; and on this plea he is entitled to have an account from the mortgagee. But this defence will be of no avail unless on the taking of the accounts it appears that the whole sum due (including both principal and interest) had been realised before the close of the year allowed by law for redemption (*d*).

But the Court is not to decree in favor of the mortgag-

(*b*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.).

(*c*) Reg. I. 1798, Sec. 3. S. D. A. 1857, pp. 96, 234: 1858, pp. 727, 757, 1235, 1525, 1691: 1859, p. 127.

(*d*) S. D. A. 1848, pp. 311, 711: 1851, p. 211. See N. W. P. v. 9, p. 371, and the cases referred to in note (*c*).

or *simply* because the mortgagee does not produce his accounts. The Court must examine the mortgagor's accounts and see whether they support his case, before deciding in his favor (*e*).

In the Lower Court the mortgagor did not insist upon the mortgagee's accounting, nor did he in his answer allege that the mortgagee had repaid himself from the usufruct. It was held that under such circumstances the objection as to not accounting could not be for the first time raised in the Sudder Court (*f*).

A mortgagee in possession foreclosed, and continued to remain in possession. The mortgagor ousted him, and the mortgagee sued to recover possession. The mortgagor defended the suit, and pleaded that before the foreclosure the mortgagee had received from the usufruct more than the whole sum to which he was entitled. It was ruled that the mortgagee must account in the usual manner (*g*). So the mortgagee was forced to account, when he had had possession not avowedly but through a *benamee* farm to his nephew (*h*).

If the mortgagee, not being entitled to possession, wrongfully enters, he is just as liable to an account as if he had been in under his mortgage (*i*).

A mortgagee, who enters into a compromise with his debtor, and acknowledges in Court that he is satisfied, and renounces his right to foreclosure, cannot afterwards change his mind, and sue for foreclosure. During the progress of a foreclosure suit, the mortgagee made a compromise with the mortgagor, and filed a soolenamah, renouncing all further claim to possession; he afterwards brought a fresh suit for foreclosure, on the ground of non-performance of the terms of the compromise, but it was dismissed by the Court, without any inquiry into the merits. In such a case, there is no remedy

(*e*) S. D. A. 1858, p. 757 : 7 W. R. p. 82 : and see next Chapter.
(*f*) S. D. A. 1859, p. 490.
(*g*) S. D. A. 1858, p. 1525.
(*h*) S. D. A. 1857, p. 234.
(*i*) 7 W. R. p. 82.

for the mortgagee, except by an action for damages for breach of contract (*j*).

And so, a decree for foreclosure cannot be set aside on the ground that the mortgagor allowed the decree to go against him without offering any opposition, in consequence of the mortgagee's having executed a deed, during the year of grace, in which he covenanted to restore the mortgagor to possession on certain conditions, which covenant he had broken (*k*). But a mortgagee may waive his right to *immediate* possession on certain conditions, and his right to foreclose will revive on breach of these conditions by the mortgagor (*l*).

A decree of Court declaring a mortgage finally foreclosed and the mortgagee entitled to possession, puts an end for ever to all right to the land, which the mortgagor may have, or any other person claiming under him, whose title did not originate prior to the date of the mortgage which has been foreclosed. It must be noted, however, that the Government may at any time cause lands to be sold for arrears of revenue, into whose hands soever they may have passed.

A foreclosure decree of the old Supreme Court in a mortgage suit (as to lands in the mofussil) is equivalent in effect to a decree in the mofussil Courts establishing proprietory right on a like instrument (*m*).

It is hardly necessary to observe, that care must be taken by the judges to ascertain the real nature of the mortgage they are dealing with, and that if the remedies applicable to one species of mortgage are made use of when the transaction belongs to another, the whole proceedings will be bad.

When possession was given by the lower Court, under

(*j*) N. W. P. v. 6, p. 260.
(*k*) N. W. P. v. 5. p. 294.
(*l*) N. W. P. v. 9, p. 564 : v. 11, p. 119.
(*m*) *Nawab Sidhee Nazir Ali Khan* v. *Ojoodhyaram Khan*, 10 Moore's Ind. Ap. p. 322, 5 W. R. p. 83 (P. C.).

the impression that the mortgage agreement was one of conditional sale, and the transaction was afterwards, on appeal, found to have been one of simple mortgage, the transfer of the land made by the Court below was cancelled, and the mortgagees were enjoined to accept a tender of principal and interest which was made by the mortgagor, notwithstanding that more than a year had elapsed from the issue of notice of foreclosure by the mortgagee, as in a case of mortgage by conditional sale (*n*). So, the Court of appeal, considering the mortgage to be by conditional sale, reversed the decision of the judge and moonsiff, who had respectively held that the transaction was a simple mortgage and therefore not subject to the rules applicable to conditional sales (*o*).

In a suit for possession on foreclosure, a decree for money cannot be given (*p*). And a suit will not lie by a mortgagee to foreclose and to recover interest. "Had the mortgagor repaid the money lent, interest would have been payable under the section referred to (*q*), but by foreclosing the mortgage and obtaining possession of the property, the mortgagee must be considered to have secured all he was entitled to receive in the transaction" (*r*).

The mortgagee having obtained a decree for foreclosure and possession, is entitled to immediate possession of the property; and if he meets with any opposition or delay, he is entitled to recover all costs and expenses incurred by him in consequence, together with mesne profits or wasilat from the date of his decree. And for these costs and mesne profits, the mortgagor and all those who represent him will be held liable (*s*).

In one case, where the terms of the contract were that in the event of the mortgagor's making default in payment on a particular day, he would put the mortgagee in pos-

(*n*) S. D. A. 1848, p. 194.
(*o*) N. W. P. v. 8, p. 370.
(*p*) S. D. A. 1851, p. 648. See N. W. P. v. 11, p. 75.
(*q*) Reg. I of 1798, Sec. 2.
(*r*) S. D. A. 1856, p. 388.
(*s*) S. D. A. 1847, p. 479.

session of certain lands by way of absolute sale, and the mortgagor made default in payment and also in surrendering his property as agreed,—the mortgagee was allowed to sue for the recovery of the principal sum lent, with interest, and was not restricted to his suit for possession (*t*).

But ordinarily the mortgagee will not be permitted to sue for the recovery of the money lent by him, instead of for foreclosure and possession, except when good and sufficient cause is shown for his adopting such a course. Apparently any thing by which, without any blame on his part, it is rendered impossible for the mortgagee to obtain possession, will alone be considered to be good and sufficient cause (*u*).

Thus the mortgagor having been all along in possession, and having neglected to pay the Government revenue, in consequence of which the land was, after the issue of notice of foreclosure, sold for arrears, the mortgagee was allowed to recover the principal and interest due to him, his lien having been destroyed through no fault of his (*v*). But, as the rights of a mortgagee are in no degree affected by any subsequent transfer of the mortgaged property except a sale for revenue, a private sale by the mortgagor, or even an auction sale in execution of a decree and after the issue of notice of foreclosure, will not entitle a mortgagee by conditional sale to sue to recover the debt. His remedy is still against the land alone (*w*). And so, where the mortgagee had obtained a decree for foreclosure and possession, but before he could get possession, the property was advertised and sold in satisfaction of the decree of another judgment creditor (*x*).

One, who for good and sufficient reason sues for the money due, instead of for foreclosure and possession, must not sue merely as on a common money bond, but as for

(*t*) 5 Sel. Rep. p. 10.

(*u*) Cons. 898, 5th Sept. 1834: 7 Sel. Rep. p. 92.

(*v*) S. D. A. 1848, p. 368.

(*w*) Sel. Rep. v. 7, p. 42: N. W. P. v. 3, p. 209.

(*x*) N. W. P. v. 7. p. 272.

money which he has become entitled to claim in consequence of the mortgagor's breach of contract. His plaint, in short, must be consistent with the case he intends to prove (*y*).

It has been said that if a suit is brought for money when it ought to have been for possession, or *vice versâ*, the objection must be specially pleaded by the party who wishes to take advantage of it, and that the Court must not of its own accord take notice of the error (*z*). But if a plaintiff sues for that to which, according to his own showing, he is not legally entitled, it is difficult to see how the Court can do otherwise than nonsuit him or reject his plaint, whether the defendant takes the objection or not.

In one instance, a mortgagee sued for and recovered one half of the sum advanced by him. The mortgagor, on receiving the loan, had executed a deed engaging to make over, or to arrange for making over certain property in mortgage by conditional sale; but he in fact made over only half of that property. The Court ordered that he should return to the mortgagee a proportional amount of the sum received by him, with interest (*a*).

When mortgaged lands are sold for arrears of Government revenue which have not accrued through the default of the mortgagee, any proceeds which may arise from the sale, in excess of the arrears, belong to the mortgagee, and he has a right of action for their recovery. And this is so, whether process of attachment on decree has been taken out prior to the sale of the property or not (*b*).

And if the proceeds in excess of the arrears due in respect of the lands sold, are applied by the Collector in liquidation of arrears due from the mortgagor on *other* lands, the sum so applied may be recovered by the

(*y*) S. D. A. 1850, p. 44.
(*z*) N. W. P. v. 8, pp. 272, 591.
(*a*) S. D. A. 1851, p. 750.
(*b*) S. D. A. 1854, p. 182: 1855, p. 411. See 1853, p. 87: 1857, p. 527: 1859, p. 622.

mortgagee from either the Collector or the mortgagor (*c*).

A mortgagee who forecloses and then gets possession, is not liable for back rents which accrued due prior to his obtaining possession,—unless he has expressly agreed that he shall be so liable (*d*). And a mortgagee who has foreclosed may, if he pleases, sell his right title and interest in the mortgaged land, and the purchaser will be entitled to possession just as the mortgagee himself was entitled (*e*).

A plaintiff sued to have his name registered in the Collectorate as proprietor of certain lands, alleging that he was in possession, the property having first been leased to him, and then before the lease expired, mortgaged to him, and the mortgage having been foreclosed. The judge nonsuited the case because the plaintiff "had not obtained possession of the foreclosure in virtue of his mortgage," and because "he was bound to sue for possession under the mortgage before he could prefer a claim for mutation of names." The Sudder Court decided that "as the plaintiff was in possession, and his suit for the mutation of names brought into issue every point that could have required investigation in a suit for possession under the mortgage," the judge should have tried the case on the merits. And it was accordingly remanded to him for re-trial (*f*).

In a suit for foreclosure, a third party intervened and proved an absolute sale to himself prior to the date of the mortgage. The mortgagee's foreclosure suit was consequently dismissed, and he was ordered to pay the costs of the intervening proprietor. On appeal, this order was confirmed, as it was the mortgagee's suit which compelled the third party to come into Court; the mortgagee, however, was entitled to recover from the mortgagor all the costs incurred by him in the case, including those of the intervenor (*g*).

(*c*) S. D. A. 1854, p. 182.
(*d*) S. D. A. 1856, p. 1019.
(*e*) S. D. A. 1860, v. 2, p. 53.
(*f*) S. D. A. 1856, p. 8.
(*g*) S. D. A. 1853, p. 574.

If a mortgagee alienates the mortgaged property while a suit instituted by him for foreclosure is pending, the alienation will not be allowed to stand between the mortgagor and those rights to redeem which that suit, in its ultimate issue, may have left open or affirmed to him (*h*).

One who has the right of pre-emption may assert it when the conditional sale comes to be made absolute. No right of pre-emption arises on the making or entering into the contract of conditional sale or mortgage. The right of pre-emption does not arise until the mortgagor's right of property has been completely extinguished (*i*).

(*h*) 8 W. R. p. 399.

(*i*) 2 W. R. p. 215 (a Full Bench decision). See *ante*, p. 34.

CHAPTER X.

OF ACCOUNTING.

In every case not coming under Act XXVIII of 1855, in which it is not admitted by the mortgagor that the sum alleged by the mortgagee to be due to him is, or at the expiry of one year from the date of the issue of notice of foreclosure was really so due, the Court must take an account of the principal, interest and costs due on the mortgage—whether the suit be brought by the mortgagor for redemption, or by the mortgagee for foreclosure. But the obligation to account depends upon the circumstances of each case, and the nature of the issues raised in it. The Privy Council have in a recent case (*j*) considerably modified the rule formerly laid down by the Courts of this country. Their Lordships have decided that the necessity (on the part of the mortgagee) to account only arises, "*firstly*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account: *secondly*, when he has deposited all that he admits or alleges to be due: and *thirdly*, when he pleads and undertakes to prove that the whole of the principal and interest have been liquidated by the usufruct of the property."

The mortgagee must file his accounts before the mortgagor is called upon to prove that the debt has been satis-

(*j*) *Forbes* v. *Ameeroonissa*, 10 Moore's Ind. Ap. p. 340, 5 W. R. p. 47 (P. C.). See 6 W. R. p. 84.

fied: so far, the *onus probandi* does not lie on the mortgagor (*k*). It was held by the Agra Sudder Court that it is the duty of the Court, when it dismisses a redemption suit on the ground of the mortgage debt not having been liquidated from the usufruct up to the date of suit, to determine the exact sum then outstanding, by making up a correct account and disposing of the several objections of the parties in regard to the items composing it, in order that no matter admitting of adjudication in that action may be left open to future litigation (*l*). But this is not in accordance with a later decision of the Calcutta High Court, by which it was declared that the finding of the Court as to the precise sums paid off was immaterial and would not be conclusive in a subsequent suit by the mortgagor for possession (*m*).

It is the privilege of the mortgagor not to be bound to account for the rents and profits received by him from the land; and there seems to be no exception to this rule, however insufficient the security may be. But if, in breach of an express agreement to the contrary, he remains in possession, to the exclusion of the mortgagee, the latter will have his remedy in a suit for possession and mesne profits.

The mortgagee is subject to an account from the time he is put in possession, and for the whole period that he remains in possession in the character of mortgagee (*n*). But he will not be so subject if the mortgage was made after Act XXVIII of 1855 came into force, and there is an express stipulation that he shall not be called on to account. If the mortgagee during a part of his term, has held under some title other than that as mortgagee, he will not have to answer to the mortgagor for the proceeds accrued

(*k*) S. D. A. 1855, p. 432: N. W. P. v. 9, p. 371.

(*l*) N. W. P. v. 8. p. 112: v. 9, p. 388.

(*m*) Marsh. p. 112, W. R. Sp. p. 33.

(*n*) Reg. I. 1798, Sec. 3. S. D. A. 1857, pp. 96, 234: 1858, pp. 727, 757, 1235, 1525, 1961: 1859, pp. 127, 490.

during that period. In one case, it happened that neither the mortgagee in possession, nor the mortgagor, chose to pay up certain old balances of revenue which had become due before the making of the mortgage. The Collector having entered on the estate, the mortgagee afterwards came forward and paid the arrears, whereupon the Collector gave him a farm of the land for ten years. These ten years were held to constitute a gap in the possession under the mortgage, and the mortgagee was not compelled to render an account of the profits then received by him (*o*).

Where the mortgage deed declared that the mortgage was to have effect from a date prior to that of the deed, it was held that the mortgagee who had been in possession was liable to account for the proceeds from such prior date, but that the mortgagor must be charged with interest from the same date (*p*).

In taking the accounts, interest is, as a general rule, allowed on the payments of both parties. There are two modes in either of which the accounts may be made up. They may be permitted to run on, from the date of the loan to the date of settlement, interest being allowed to the one party on the whole sum lent, and to the other on the sums realised over and above the interest to which the mortgagee is entitled, from the date of realisation :— or the amount collected by the mortgagee in possession may be carried first to interest, and after paying that, to the liquidation of the principal, the account being closed at the end of each year and there being allowed from year to year only reduced interest on the reduced principal (*q*). The result attained by these methods is the same.

There is no law which restricts the mortgagee to the receipt in the whole of interest only equal to the amount

(*o*) N. W. P. v. 7, p. 7.
(*p*) N. W. P. v. 10, p. 684.
(*q*) S. D. A. 1848, p. 549 : 1852, p. 831 : 1859, pp. 497, 1211, 1543. So, 5 W. R. p. 200 : 1 Agra, p. 132.

of the principal lent (*r*). It may be remarked, however, that it has been held by the Bombay High Court that by the Hindu law, interest exceeding the amount of the principal sum lent, cannot be recovered *at any one time;* and that Act XXVIII of 1855 has not, by repealing section 12, Regulation V of 1827 of the Bombay Code, or otherwise, altered this rule of Hindu law (*s*).

When on the accounts being adjusted, it is found that the mortgagee's claim for principal and interest has been completely satisfied, all subsequent receipts are to be considered to belong to the mortgagor, and he will be entitled to simple interest on them until they are repaid to him (*t*). But although the general practice of the Courts is to allow interest on mesne profits or wasilat, still it will not be given if there has been any improper delay in the institution of the suit for their recovery, or if any special ground exists for withholding it. There is no rule rendering it compulsory on the Courts to decree a specific rate of interest; a discretionary power is vested in them, in reference to the circumstances of each case (*u*). And mere delay is not necessarily *improper* delay (*v*).

Any agreement made by the parties as to the manner of accounting will be enforced, if not in itself illegal. Thus, if they have agreed that the residue of the sums received from the land, after payment of interest, shall be carried to liquidation of the principal and the account closed to the end of each year, the accounts must be taken in this manner (*w*).

As a general rule, in cases to which the usury laws are applicable, and where there is no agreement that a less rate shall be taken, the Courts will allow interest at the

(*r*) S. D. A. 1859, p. 1543: 2 W. R. p. 289.

(*s*) 1 Bombay p. 47: 3 Bombay (Ap. Civ. Jur.) p. 23.

(*t*) S. D. A. 1853, p. 464. See as to allowing interest, N. W. P. v. 10, p. 257.

(*u*) N. W. P. v. 8, p. 228: v. 10, p. 8.

(*v*) N. W. P. v. 9, p. 368. See S. D. A. 1855, p. 404.

(*w*) S. D. A. 1848, p. 549. N. W. P. v. 10, p. 22.

rate of 12 per cent. per annum. But they are not bound to award 12 per cent.; that is the highest rate which they are permitted to give, and though it is customary, and the general understanding of the country that 12 per cent. should be awarded on deeds containing no stipulation for a lower rate, still this general custom will be departed from, if the mortgagor can establish any good reason for its being so (*x*). In cases to which the usury laws are not applicable, the Courts will allow interest at the rate stipulated for in the contract: or if no rate of interest shall have been stipulated for, and interest be payable under the terms of the contract, at such rate as they shall deem reasonable (*y*).

Any stipulation by which the mortgagee agrees to take interest at a rate lower than 12 per cent. will be binding on him. And where he has consented to take the usufruct of the land in lieu of interest, he cannot claim interest at the legal rate or otherwise, on the ground of the usufruct having fallen short of the legal or any other rate (*z*). In usufructuary mortgages the law requires an account of the proceeds in order to prevent the mortgagee receiving more than his principal with interest at 12 per cent. If the proceeds do not give what is equivalent to interest at 12 per cent. and no rate is stipulated for, "the presumption is that the usufruct was deemed by the mortgagee sufficient interest for the money debt, and the mortgagor is not bound to pay a further sum, to make up any particular rate" (*a*).

In the case of a non-usufructuary mortgage, interest not being expressly stipulated for, the mortgagee was held to be entitled to interest only from the date upon which the loan became re-payable (*b*). And in another

(*x*) S. D. A. 1852, p. 748: N. W. P. v. 8, p. 228: v. 9, p. 368: v. 10, pp. 22, 684. See S. D. A. 1854, p. 518.

(*y*) Act XXVIII. of 1855, Sec. 6.

(*z*) N. W. P. v. 7: p. 307; v. 8, p. 178: S. D. A. 1852, p. 678.

(*a*) S. D. A. 1860 v. 2, p. 223. See N. W. P. v. 3, p. 417.

(*b*) S. D. A. 1855, p. 54.

case, interest was allowed only from the date of suit, until realisation of the principal sum decreed (*c*).

It seems almost superfluous to remark that the ordinary rules regarding the allowance of interest will be followed, even when the parties are both Mussulmans (whose religion and law forbid the taking or giving of interest). The Mahomedan law is not to be acted on in this instance, as the suit does not relate to the "inheritance of, or succession to, landed property," in which cases alone the Regulations require that the proceedings should be regulated by the peculiar law of the litigant parties (*d*).

Under sec. 5, Reg. XXXIV of 1803 (*e*), the Courts are not in any case whatever, except those specified in sec. 11 (which relates to respondentia loans and policies of insurance), to decree a greater sum for interest than for principal. But this rule of course does not apply to interest accrued due after the institution of the suit (*f*).

Interest above the rate of 12 per cent. per annum is not to be allowed under any circumstances in the case of contracts entered into before Act XXVIII of 1855 came into force. And compound interest, arising from intermediate adjustments of accounts, is never to be given in such cases. But this rule does not apply where accounts between the parties have been adjusted, and the former bonds or agreements have been cancelled and new bonds or agreements taken for the aggregate amount of principal and interest due, consolidated into principal (*g*).

In one case the accounts were prepared on the principle

(*c*) N. W. P. v. 10, p. 363.

(*d*) Reg. V. 1831, Sec. 6, Cl. 2. S. D. A. 1848, p. 530. N. W. P. v. 7, p. 88.

(*e*) Reg. XV. 1793, Sec. 6, repealed as well as Reg. XXXIV 1803, Sec. 5, by Act XXVIII of 1855. N. W. P. v. 8. p. 479.

(*f*) Sel. Rep. v. 1, p. 242 : v. 3, p. 270 : v. 4, p. 261. See S. D. A. 1859, p. 1543.

(*g*) Reg. XV. 1793, Secs. 4, 7, 8 : Reg. XXXIV. 1803, Secs. 3, 6 : Reg. XVII. 1806, Sec. 2, (all repealed by Act XXVIII of 1855). S. D. A. 1852, p, 1021. N. W. P. v. 11, p. 175.

of striking a balance of interest at the close of the year, deducting the principal of all payments by the debtor, from the principal of the debt, and setting off only the interest accruing to the debtor on his payments during the year, against the interest becoming due on his principal debt: but the Court held that this mode of accounting was wrong, as no compound interest was allowable, and that the debtor was entitled to have all sums, whether principal or interest, credited to him during the year, applied first to the liquidation of interest due, and the surplus only, remaining after such liquidation of interest, carried to the reduction of the principal (*h*).

Under Act XXVIII of 1855, a contract by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, is binding upon the parties. And upon any mortgage or contract entered into after the passing of that Act interest is to be calculated at the rate stipulated therein, or if no rate of interest has been stipulated for, and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable (*i*).

The mortgagee is required to deliver accounts of his gross receipts and of his expenditure, and it is a positive duty that he should do so (*j*). Moreover the accounts rendered must be full and complete, and the judge must not rest contented with a mere rough abstract of the receipts during the time the mortgagee has been in possession (*k*).

The mortgagee is bound to furnish an account of the *bonâ fide* proceeds of the estate while in his possession. *Jumma-wasil-bakee* papers, and other such like papers are not *per se* a sufficient account within the meaning of Reg. I.

(*h*) S. D. A. 1853, p. 464.

(*i*) Act XXVIII. 1855, Sections 4, 6.

(*j*) N. W. P. v. 7, pp. 68, 511: S. D. A. 1856, pp. 328, 522: 1857, p. 1513. Reg. XV. 1793, Sec. 11: Reg. XXXIV. 1803, Sec. 10.

(*k*) N. W. P. v. 5, p. 244.

1798, sec. 3,—but these papers may be used in corroboration of a properly framed account. The Court in a recent case said, the *jumma-wasil-bakee* papers "are not, and cannot be, the account itself. The account which the mortgagee has by law to put into Court, is not that of his agent or *tehsildar*, given by the latter for his master (the mortgagee's) information as to such agent's collections. The *jumma-wasil-bakee* paper however, is this latter only. The accounts to be put in under the law, are to be made, verified and proved by the mortgagee himself." Then the Court after saying that *jumma-wasil-bakee* papers and the like might well be adduced to support the mortgagee's own account when duly made and filed, continued:—"The account required from the mortgagee is one setting forth what he has realised,—from what portions of the mortgaged property,—in what terms or periods,—with what loss and gain on the several assets,—with what necessary reductions,—and what remains then as the net profits which can be taken as actual realisations toward liquidating the sum due under the mortgage" (*l*).

The mortgage being of a fractional share of a joint estate managed by common servants of all the sharers, the mortgagee put in an account shewing what he had actually received from first to last, and swore to the correctness of it. The general accounts of the estate were called for, and produced by one of the joint proprietors, in whose hands they were. It was held that these accounts would ordinarily be in themselves sufficient, but that, in the particular case, further inquiry was necessary. And the Court declared it to be the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he received out of the estate all that the mortgagor ought to have received, and to see not only that all the assets are realised and brought straight to account, but that the expenses are carefully regulated (*m*).

(*l*) 5 W. R. p. 271. See 5 W. R. p. 53, and 9 W. R. p. 572.

(*m*) 2 W. R. p. 150.

The mortgagee must swear, or if he is a person exempted from taking oaths, must subscribe a solemn declaration, that the accounts delivered are true and correct. And this must be done by the mortgagee himself, the oath of his *karinda* or manager being wholly insufficient, and it being the duty of the judge who tries the suit, to require the mortgagee to attend his Court in person, and to depose to the truth and authenticity of his accounts (*n*). But native ladies whose attendance in Courts of Justice is usually dispensed with, are not obliged to appear in Court to swear to the truth of the accounts prepared by their agents. The oath of the agent is all that is required in such cases (*o*).

When there are several joint mortgagees, the oath of one or more of them, competent to discharge the duty, is sufficient in regard to the *primâ facie* admission of the accounts. How far such accounts are deserving of credit, is another question (*p*).

In a case in which the oath of the gomastah of the mortgagee was by consent taken in the lower Court as sufficient, the Sudder Court refused to listen to the objection that the mortgagee himself ought to have sworn (*q*).

It appears that when a mortgagee, no longer in possession sues to recover a balance from the mortgagor, he is not bound to swear to the accounts. These may possibly be no longer in his possession (*r*).

A mortgagee who evades the rendering of the required accounts, or who will not swear or depose to the truth of those rendered, subjects himself to a fine (*s*). And in such a case, any reasonable proof, even if offered by the mortgagor (*t*), may be accepted by the Court. In one in-

(*n*) Reg. XV. 1793, Sec. 11: Reg. XXXIV. 1803, Sec. 10. N. W. P. v. 7, p. 607: S. D. A. 1856, p. 522. See S. D. A. 1858, p. 1525.

(*o*) N. W. P. v. 9, p. 465.

(*p*) N. W. P. v. 9, p. 465: v. 10, p. 318.

(*q*) N. W. P. v. 10, p. 318.

(*r*) *Ibid.*

(*s*) N. W. P. v. 7, p. 68.

(*t*) S. D. A. 1858, pp. 727, 1235: 1859, pp. 270, 812: 6 W. R. p. 127.

stance, a mortgagee in possession had applied to the Collector to have a renewal of the settlement of the estate made in his name, and sent in *doul* papers along with his application, praying to be admitted to engage for the estate at the jumma therein specified; these papers when produced afterwards by the mortgagor, were held to be sufficient evidence, as against the mortgagee, he having failed to furnish any proper account (*u*). So an account made out by an Ameen on the spot from local inquiry, has been held to be a good basis on which to proceed, and to be sufficient as against the mortgagee who had chosen to withhold his accounts (*v*).

It is a very common practice, when there are disputes as to the items of the account, for an Ameen to make out a statement of the collections, from investigation made by him on the spot; and when this is done, the collections are to be assumed as estimated by him, unless objections are at once taken to his report. And it is not proper to put aside the Ameen's report to which no objection has been taken by the parties, and to take the rent-roll as the basis of the accounts. Nor is the rent-roll admissible as conclusive evidence, when the party in possession has filed his papers showing the amount collected (*w*).

It has been said that an Ameen ought not to be deputed to make inquiries on the spot unless the mortgagee produces his accounts. But this dictum is scarcely borne out by the practice which prevails (*x*).

The account will be taken on the footing of village papers regularly filed by the mortgagee and not objected to at the time by the mortgagor, unless very good reason is shown for putting these accounts aside and proceeding to a settlement on other and independent data (*y*). If

(*u*) N. W. P. v. 7, p. 511.

(*v*) S. D. A. 1848, p. 346. See 1856, p. 328: 1857, p. 1513: 1862, pp. 51, 57.

(*w*) S. D. A. 1852, p. 831. See 1860, v. 1, p. 239.

(*x*) S. D. A. 1857, p. 1513: but see S. D. A. 1858, p. 756.

(*y*) N. W. P. v. 10, p. 684.

the mortgagee has not kept accounts, or has kept them badly, the presumption in every thing will be against him (*z*). But if the mortgagee does not file proper accounts, it does not follow that those of the mortgagor are necessarily to be taken as correct without any inquiry (*a*).

The mortgagee having rendered and sworn to the truth of his accounts, the Court will permit the mortgagor to examine them, and after hearing his objections, will proceed to take evidence on both sides. But the objections of the mortgagor must be specific and distinct, as to each item intended to be disputed: and a mere general charge of falseness and inaccuracy will not be attended to (*b*).

A judge is not bound to adopt the accounts which he believes to be false, either of one party or of the other, but, rejecting the detailed accounts furnished, he may on some equitable principle fix a sum, according to his best judgment, as the amount of the annual produce. And in one case, where the judge, doubting the accounts of both parties, valued the lands at the sum assessed on them by the Collector during a period of temporary resumption, the Court considered this a very equitable mode of calculation, and confirmed it (*c*).

But the valuation put upon the lands by the judge must be founded on some distinct tangible ground, and not on mere conjecture or guess according to the best of his information and belief. Thus when the lower Court disallowed the rent entered against certain lands in the yearly rent-roll filed in the Revenue office, and assumed in its place a conjectural rate obtained from an average of the several rent rates leviable from the other lands in each of the mouzahs which were the subject of the

(*z*) N. W. P. v. 10, pp. 684, 378: 6 W. R. p. 127. See 8 W. R. p. 203: 9 W. R. p. 275.

(*a*) N. W. P. v. 9, p. 352: S. D. A. 1858, p. 756.

(*b*) Reg. XV. 1793, Sec. 11: Reg. XXXIV. 1803, Sec. 10. N. W. P. v. 6, p. 32: v. 7, p. 607: v. 8, p. 107.

(*c*) N. W. P. v. 4, p. 317.

suit, it was held that the average struck in such a manner must be purely arbitrary, and that the enhanced rate fixed on such uncertain grounds, and unsupported by evidence, could not be maintained (*d*).

The *nikasee* accounts annually given in by the Putwarree, furnish a valuable test of the accuracy of the accounts and papers filed by the parties, and a judge may with great propriety refer to them (*e*). But though they are useful as a test, they are not in any way indispensably necessary, when the details furnished by the mortgagee fully enable the Court to proceed to an adjustment without them. And although the judge may refer to them of his own accord, in order to check accounts given in by the parties, a decree of which they are the sole foundation is bad, unless they have been regularly filed in the suit; the judge must not of his own accord send for them to the Revenue office, and from them alone make out an account (*f*).

If the mortgagee makes an admission in his pleadings as to the amount of his receipts from the land, believing it at the time to be for his own benefit, he will not afterwards be allowed to contradict or to explain away the statements he has so made (*g*).

As a general rule, the Court will give the mortgagor credit for every sum entered in the accounts rendered by the mortgagee as realized, and will not allow the latter to repudiate any such sum on the ground of its being an illegal cess, or payment which could not have been enforced. On the other hand, such illegal payments when not admitted by the mortgagee, cannot be allowed; and the mortgagor will not be permitted to go into proof of them (*h*). But although the mortgagor will not be cred-

(*d*) N. W. P. v. 8, p. 107.

(*e*) N. W. P. v. 5, p. 244: v. 6, p. 32.

(*f*) N. W. P. v. 7, p. 68.

(*g*) N. W. P. v. 8, p. 225: v. 9, p. 371.

(*h*) N. W. P. v. 7, p. 248: v. 8, p. 178: Rep. Sum. Cases, 10th Feb., 1846.

ited with sums derived from *haut* or fair tolls, he is nevertheless entitled to credit for the rent of the land on which the *haut* or fair was held (*i*).

The gross receipts referred to in the Regulations are the gross sums paid by the tenantry of the estate mortgaged, not merely what actually reaches the mortgagee's hand. And if he creates a middle-man between himself and the tenants this does not exonerate him from the liability to account for the gross receipts (*j*). He must answer for the rents appearing in the *jummabundee*, and not merely for his actual collections: but he will of course only be liable for the amount realised, if he can show good reason for not having realised, the whole rent-roll exhibited in the *jummabundee* (*k*). If the land is held by under-lessees by virtue of leases granted prior to the mortgage being made, so that the mortgagee has not in fact had the full usufruct of it, the mortgagor is to be credited only with the net profits received by the mortgagee (*l*). So if the estate, though nominally in the hands of the mortgagee, is actually managed by the mortgagor (*m*).

If the mortgagee has actually cultivated the land himself, he must account for the fair rent of the land. But he need not account for the extra profit made by him by reason of having himself cultivated. He need account only for such profits as the mortgagor would have realised had he let out the property (*n*).

It has been already seen, that the mortgagee is responsible for gross mismanagement, or for waste committed by him (*o*). If he chooses improperly to record certain lands

(*i*) Rep. Sum. Cases, 10th Feb. 1846.

(*j*) S. D. A. 1852, p. 1137. See S. D. A. 1857, p. 1513.

(*k*) N. W. P. v. 8, p. 564: v. 9, pp. 159, 201, 465: v. 10, pp. 51, 355. S. D. A. 1858, p. 1847: 1860, v. 1, p. 639. See 2 W. R. p. 150.

(*l*) N. W. P. v. 8, pp. 107, 112, 564.

(*m*) N. W. P. v. 10, p. 115.

(*n*) 7 W. R. p. 244.

(*o*) *Supra*, p. 89.

as rent-free, which are not so, he will be charged with the full rent which they would have brought in (*p*). And a clause in a mortgage deed to the effect that an allowance shall be made to the mortgagee "for losses," has been held to apply only to losses beyond his control, and not to arrears which he has wilfully or by negligence allowed to remain outstanding (*q*).

All expenses fairly incurred in respect of the property will be credited to the mortgagor. He will be allowed a charge for the wages of Chowkeydars and Putwarees, which form regular items in village expenses altogether independent of the will of the mortgagee, and which he, as a representative of the owner, is compelled by the orders of Government to disburse (*r*). But those payments only will be allowed which have been *bonâ fide* made: and therefore where the possession of Jagheer, or service land, by the Chowkeydars of each mouzah, was shown by the entries of rent-free lands under their names in the yearly jummabundees, a charge for Chowkeydars was struck out of the mortgagee's account (*s*).

The reasonable costs of collection and management will also be allowed; and, in the Agra Court, it seems that as a general rule, 5 per cent. will be held to be a proper charge when the villages are settled or when they are sub-let, and 10 per cent. when they are not settled or sub-let: there being more trouble in the case of the latter, and an allowance for contingent expenses being considered not improper (*t*).

The percentage for collection, is apparently charged on the gross rental (*u*). And it is considered to cover ordinary balances (*v*).

(*p*) N. W. P. v. 9, p. 525.

(*q*) N. W. P. v. 9, p. 159.

(*r*) N. W. P. v. 7, pp. 248, 477: v. 8, pp. 107, 564.

(*s*) N. W. P. v. 8. p. 107. And see generally as to what will be allowed, v. 9, pp. 201, 371: v. 10, pp. 355, 378.

(*t*) N. W. P. v. 7, p. 477: v. 8, pp. 112, 564: v. 9, p. 371: 1 Agra, p. 132. But see as to this, 9 W. R. p. 575.

(*u*) N. W. P. v. 8, p. 112.

(*v*) N. W. P. v. 9, p. 371: v. 10, p. 51.

When a shop was mortgaged, the mortgagee was held entitled to charge the mortgagor with necessary repairs (*w*).

A mortgagee is to be allowed all payments in respect of Government revenue, made by him while in possession; and this, whether the revenue fell due after the making of the mortgage or before it, the mortgagee being entitled to do any thing which it is the duty of the mortgagor to do in order to secure the possession of the land for him (*x*). But if it has been expressly agreed that these charges shall be borne by the mortgagee, he will, of course, not receive credit for them in passing his accounts (*y*). Nor, on the other hand, will he be debited with any thing which it has been specially agreed he shall not be liable for. And therefore when there was a provision that the mortgagor should make good the balances of rent unpaid by the cultivators, the mortgagee was held not to be liable for such balances, with which the mortgagor sought to charge him on the ground of their having been lost through his neglect (*z*).

A mortgagee who, being in possession, lets the estate fall into arrears, in consequence of which the Collector enters on the land for a time, must account for the full profits of the whole of that period, just as if he had never been disturbed in his possession,—it being his duty, in the absence of an express stipulation to the contrary, to pay the Government revenue before disbursing any other sum (*a*). And this is so, even when the balance did not originally accrue from his own personal default, but arose from the default of the owners of other lands, which together with those mortgaged formed a single undivided mehal, every portion of which was responsible for the revenue

(*w*) 2 Agra, p. 187. So, 9 W. R. p. 488.

(*x*) S. D. A. 1848, p. 346: 1852, p. 1063. N. W. P. v. 7, p. 7. 3 W. R. pp. 6, 174. See, however, 3 W. R. p. 162.

(*y*) N. W. P. v. 8, p. 225.

(*z*) N. W. P. v. 7, p. 477. But see v. 9, p. 159.

(*a*) N. W. P. v. 3, p. 417. See v. 7, p. 7: v. 9, p. 465: v. 10, p. 553.

due in respect of the whole. The possibility of the proprietor of one mouzah being called upon to make good arrears unpaid by the proprietor of the other, necessarily arose out of the nature of the tenure, and was one for which the mortgagee was as much bound to provide, as for the revenue payable in respect of the mouzah which was pledged to him (*b*).

But the mortgagee will not be liable if the default, though nominally made by him, is in reality that of the mortgagor (*c*).

If the nature of the mortgage agreement is such that there is an annual payment to be made to the mortgagor, and these payments are allowed to fall into arrear, the law of limitation will have effect: and the mortgagor cannot, when the accounts are taken in a case to which the old law of limitation is applicable, be allowed credit for sums which became due more than 12 years previous to the institution of the suit. Therefore when the contract was that the mortgagee should pay an annual rent of 40 Rupees to the mortgagor, but no payment was in fact made for many years, the mortgagor was credited with rent for 12 years only, his claim for the rest that was due being barred (*d*).

(*b*) N. W. P. v. 9, p. 164. See S. D. A. 1855, pp. 31, 44.

(*c*) N. W. P. v. 11, p. 115.

(*d*) S. D. A. 1850, p. 205.

CHAPTER XI.

OF MOFUSSIL MORTGAGES IN THE HIGH COURT AS A COURT OF ORIGINAL JURISDICTION.

Having sketched the law which governs mortgages in the Mofussil Courts (and consequently in the High Court also as a Court of appeal from them,) it remains to add a few words as to the law in respect to mortgages as administered in the High Court as a Court of Ordinary Original Civil Jurisdiction. In the exercise of that jurisdiction, the High Court stands in the place of the late Supreme Court. As such, the law which it applies to mortgages may be said generally to be the English law,—and this, without reference to the local situation of the lands mortgaged, or to the form of the mortgage, whether it assumes the form of an English mortgage, or one of the forms in common use in the Mofussil and among the natives of this country. But it is only speaking *generally* that the English law can be said to be applicable. For it was held by the late Supreme Court, that when the evidence shows that the contract was made *with special reference to the Mofussil law*, the Court must decide the case according to that law, although it would not be bound to follow the Mofussil Courts as to matters of *mere procedure*. In delivering judgment in the case of *Skinner* v. *Sandyal* (*a*), the Chief Justice Sir

(*a*) Supreme Court 4th August, 1855. See *Doe* d. *Sibchunder Doss* v. *Sibkissen Bonnerjee*, 1 Boulnois, p. 70.

Lawrence Peel said: "A preliminary question arises, viz., by what law should the cause be decided? It is a case of contract, and the defendants are Hindus, and by the terms of the statute the contract should be governed by their law. But in truth the law of mortgages in the Mofussil now depends on the Regulations, and not simply on the Mahomedan or Hindu law, and that statute consequently furnishes no rule. Had the evidence shown that these contracting parties had contracted with reference to a different law than the law of the *forum*, then, as we conceive that it would be perfectly competent for them to do so, the Court must have decided the case by the law of their adoption. There is certainly considerable difference between the law of mortgages as administered in the Company's Courts and the law of mortgages as applied in this Court. Still the fundamental principle under both systems, is that the mortgage security is to be a security for principal, interest, and costs only; and in whatever form it be taken, so far as it is a mortgage security, it will not be allowed to have any other effect. The law as to land tenure in India, and the effects of the revenue system there on the rights of proprietors or of persons interested in land, are very different from the law of real property in England, and the effects of any fiscal laws upon land; and may well justify the adoption of securities differing from those which are commonly adopted under the English law. And when the forms of securities which are adopted in Mofussil mortgages, and the estates which are created there to give effect to such securities, obtain in contracts between British subjects, or between British subjects and natives, the adoption of them may be evidence that the parties meant, so far at least, to contract on the basis of the local law. The English law has nothing opposed to such an adoption and incorporation into itself, of a local law not forming part of it."

In a more recent case in which a second mortgagee sought to redeem the first mortgagee, all the parties being

Hindus, it was unsuccessfully contended that the Mofussil law governed the case, and that according to it, the first mortgagee having a mortgage in the nature of a conditional sale, could not be redeemed against his will by a second mortgagee (*b*). The lands were situated in the Mofussil, and the plaintiff, the second mortgagee, held a simple mortgage. The defendants were first mortgagees under a deed in the English form. The defendants got a decree for foreclosure in the Supreme Court, but did not make the plaintiff, as second mortgagee, a party to the suit. The defendants having been put in possession of the property under their foreclosure decree, the plaintiff instituted a suit to redeem in the Supreme Court. In delivering the judgment of the Court, *Colvile* C. J. said (*c*) : "The first question is whether the plaintiffs, independently of Mofussil law, have established a right to redeem. Upon the facts, both the securities of the defendants are anterior to the only security on which the plaintiff can rely ; they are so both by registration and by reason of the plaintiff's previous securities being all merged in the last. The plaintiffs can only redeem on the footing of their last security, and on redeeming both the mortgages on which the defendants claim, and on which they have obtained decrees against the mortgagor. The next question is as to the nature of the last of the plaintiff's securities. It is a security which clearly, according to the law of this Court, is a pledge of the land, and entitles the pledgee to come not as on a mere money demand, but against the land, to get an account, and to claim a foreclosure, or sale, on default of payment of the mortgage debt. It is that sort of pledge which entitles the pledgee to redeem a prior pledge in order to give effect to his own security, supposing Mofussil law not to be different from ours, or not to be applicable. But it has been contended that we ought to apply Mofussil law, and that according to that law no inter-

(*b*) *Bholanath Coondoo Chowdry* v. *Unodapersad Roy*, 1 Boulnois, p. 97. See S. D. A. 1858, p. 657.

(*c*) 1 Boulnois, p. 100.

est at all passes to the subsequent mortgagee, or at least that he has no *locus standi* to re-open a foreclosure. The law that is invoked, does not appear to us to be like a *real* law, but rather to be part, either of the law of contract or of legal procedure. That there may be rights acquired in land by a pledge as mortgage of it, is common to both laws. The defendants have taken, on land in the Mofussil, a mortgage in the English form: the inference is therefore strong that they intended to contract with reference to English law, and to enforce their rights according to that law. And not only is the mortgage in the English form, but the deed contains a jurisdiction clause. Then all the argument that the *bye-bil-wufa* or mortgage by conditional sale, according to Mofussil law, gives no remedies against the mortgagor personally, but only against the land, falls to the ground, when we consider that the law of this Court, and the terms of the defendants' mortgage deed, give the mortgagees a right against both the land and the person. The defendants have contracted not only for such a security as a *bye-bil-wufa* affords, but for all the rights given by an English mortgage. Upon this it is said that the Mofussil courts have treated English mortgages in the same way as *bye-bil-wufas*. If this be the case, the courts may possibly be right to some extent, for though an English mortgage deed is a money bond, it is also a security of another kind, and is a sort of deed of conditional sale: and so far the Mofussil Courts may legitimately have considered Regulation XVII of 1806 to apply to it. It has also been argued, that the Mofussil Courts consider a decree of foreclosure of this Court as entitled to the same effect as a decree of foreclosure in a Mofussil Court under the Regulations. They are right in this also, with one limitation—that is to say, if they take the decree of foreclosure of the Supreme Court to be binding on all parties to the suit in which the decree was made, and if they have not given the decree a wider operation than this Court does. A decree

of foreclosure has been obtained in this Court by the defendants, who, instead of following the ordinary procedure of the Court, omitted to make the plaintiffs parties to the suit. We cannot help the operation of this. When it is questioned before us, we must regard the decree of foreclosure wholly independently of what has been decreed in the Mofussil Courts. The question has been raised whether we could contravene any Mofussil law or refuse to apply any *lex loci*. But do we contravene any such law? It cannot be said that there is any substantive law on the subject. There is no law which says the mortgagor may not deal with the interest that remains in him. It is indeed admitted that he may sell his interest out and out to a purchaser, and that such purchaser stands in his shoes: this being the case, how can it be said that he shall not conditionally dispose of his interest, when there is no law that forbids his doing so? There is nothing that makes a second mortgage a prohibited security, and if the principle of assignment is once recognized, it is illogical not to recognize a conditional assignment also. Assuming the law to be exactly what it has been argued to be, it only shews that, according to the law of the Mofussil under Regulation XVII of 1806, a mortgagee can make his interest absolute against subsequent incumbrancers without going through certain forms against them which in this Court are essential: and this is a simple matter of procedure. It is treating this contract in the same way as a Court of law treats the assignment of a *chose in action*. The Regulation may have been framed in contemplation only of the agreement between the parties to the contract, or it may have been framed on the balance of convenience, and it may therefore have been laid down by the Courts that when the mortgagor retained any interest, he alone should receive notice, and that it should be left to the honesty of that person to give notice to other incumbrancers. But this does not alter the substantive law: it only makes the incumbrances less secure, and

constitutes no *lex loci rei sitæ* such as we are bound to adopt. This Court is to administer Hindu law when the parties are Hindus; and if the law as to mortgages among the Hindus were *res integra*, it might be said that we went far in importing the equitable doctrines of the English law into the question: but now that law is established. In 1806 the Legislature of this country applied the general equitable law of foreclosure to these mortgage agreements, but it gave a foreclosure somewhat different from that of our Courts. It cannot be said that because the parties to this cause happen to be residing in the Mofussil, this Court is to depart from its general rules. It has been argued that the plaintiffs have already obtained in the Mofussil Court, all that by the Mofussil law they could get, and all that they expected to get when they entered into the contract, and that they ought not to be allowed to put themselves, by coming into this Court, in a better position than if the defendants had brought their foreclosure suit in the Mofussil instead of here. But the defendants chose to come here and take a decree for foreclosure. Their position would, no doubt have been different under a Mofussil decree: but the defendants having chosen to come here, the plaintiffs (having a right to redeem) say 'we were not made parties, the right of redemption is still subsisting—give effect to it.' Possibly if the defendants had adopted some other mode of proceeding, they might have had other rights than those they now possess, but this consideration cannot control the rules of this Court. There is in reality no hardship on the defendants, for this is no mine sprung upon them after foreclosure. The defendants might have taken a decree in a Mofussil Court if they had pleased: but they did not do so, though they knew of the existence of the plaintiffs' claims. Possibly the plaintiffs may be blamed for having slept on their rights for so long: but what can be said for the defendants not having made the plaintiffs parties to their foreclosure suit, except that they chose to rest on their

view that Mofussil law was applicable to the case? They chose to do what the Court considers wrong; their opinion was a speculation which the Court does not support. There must be a decree for redemption."

In another case (*d*) the mortgagee taking advantage of the mortgagor's being personally subject to the jurisdiction of the Supreme Court (which gave that Court jurisdiction even although the land, the subject of suit, was situate in the Mofussil), brought an action of ejectment against the mortgagor, to recover possession of land in the Mofussil. He claimed under a mortgage by way of conditional sale. On the 11th August 1858 which was after the date on which the mortgage debt was by the terms of the contract repayable, the defendant, the mortgagor, deposited the amount of the mortgage debt in the Zillah Court: and on the 17th of September notice of this deposit was given to the mortgagee. The plaint was filed on the 13th of August 1858. A verdict was given for the defendant, but on an application for a new trial subsequently made, it was contended that a verdict ought to be entered for the mortgagee on the ground that, notwithstanding the Regulations I of 1798 and XVII of 1806, he was entitled to bring an action of ejectment in the Supreme Court. For the mortgagor it was argued that the deposit of the mortgage money in the Mofussil Court by him, was a sufficient redemption of the mortgage under the provisions of Regulations I of 1798 and XVII of 1806; and further that if it was not, the plaintiff, the mortgagee, was bound to proceed in the Mofussil Court to obtain a foreclosure. The Court (*e*) held that the deposit of the mortgage money by a mortgagor in the Zillah Court, after the mortgage had become absolute, but before the institution of the proceedings in the Zillah Court for foreclosure, was not within the Regulation, and

(*d*) *Doe d. Chutto Shaik Jemmadar* v. *Subbessur Sein*, 2 Boulnois, p. 151.

(*e*) Sir C. Jackson and Sir M. Wells, J.J.

was therefore ineffectual to redeem the mortgaged property. Upon the second question,—whether the plaintiff had any right to bring an action of ejectment in the Supreme Court against the mortgagor for possession of the property, or whether he ought not to proceed in the Zillah Court within the jurisdiction of which the property was situate, the Court gave the following judgment: "This action of ejectment is brought by one native against another, and is founded on a Bengallee *bye-bil-wufa* mortgaging lands situate in the Mofussil. This mortgage has become absolute at law by the expiration of the time stipulated for, without payment of the mortgage money. It is only the accident of the defendant being an inhabitant of Calcutta which gives us jurisdiction,—a jurisdiction often doubted,—often found inconvenient,—but now firmly established. But although we may have jurisdiction in this case, we are bound to administer the *lex loci rei sitæ*, if we can ascertain what that law is. We are not, of course, bound to administer a mere law of procedure existing in the Mofussil; but if we find a law existing there which controls the right of the parties to the land in question, we are bound to administer it. Regulation XVII of 1806 certainly establishes a form of foreclosure for the mortgagor in the Zillah Court. But it is evidently a measure framed for the protection of the mortgagor to secure to him certain rights,—amongst others, firstly, the right of having twelve months' time from the date of the institution of proceedings for foreclosure in the Zillah Court to redeem the land; and, secondly, redemption of his land on the mere deposit of his money in Court, without re-conveyance or decree for redemption. Now, these provisions confer on the mortgagor positive rights which he had not before, with reference to which the mortgagee must also be supposed to contract, and which it would be unjust in this Court to take away from the mortgagor. This action of ejectment shows how injuriously the mortgagor may be

affected by the non-application of the *lex loci*. If the lessor of the plaintiff had proceeded in the Zillah Court, the money which has been deposited there, would have redeemed the land and restored it to the defendant without further litigation or expense; but this action of ejectment cannot be defeated by any such payment, and the defendant has no other remedy in this Court than the very expensive and tedious one of a Bill in Equity to redeem. Then again, if the mortgagee can sue here in a case like this, he might file a claim and obtain a final decree in much less than twelve months, and thus deprive the mortgagor of the benefit which the *lex loci* gives him. The case of *Bholanath Coondoo Chowdry* v. *Unodapersad Roy* (*f*), has been cited as an authority against the defendant, but it is clearly distinguishable from the present case. In that case the defendants claimed under a mortgage deed prepared in the English form, with a jurisdiction clause submitting all questions to the decision of the Supreme Court, and under this deed the defendants elected to sue in the Supreme Court, and so framed their suit here that justice was not done to the plaintiff, a second mortgagee under a Bengalee mortgage, who was not made a party to it. Under such circumstances, the Court properly refused to listen to the defendant's argument that the second mortgagee should proceed in the Mofussil, where, moreover, it was very doubtful whether he could get relief. The only parts of the decision of Sir James Colvile, which bear on the present case, are those in which he speaks of Regulation XVII of 1806 as a law of procedure. It is quite clear that it is so to some extent; but in the case before Sir J. Colvile, it was unnecessary for him to consider the effect of those provisions which, we now think, gave the mortgagor substantive rights as well as a mode of procedure. We are therefore of opinion, on the whole case, that the rule must be discharged with costs."

(*f*) *Supra* p. 220.

But cases such as these last referred to can but seldom occur now, under the restricted jurisdiction which the High Court as a Court of original jurisdiction exercises in suits relating to land. Such suits are not cognisable in the High Court merely by reason of the defendant being personally subject to the jurisdiction. By section 12 of the Letters Patent, the Court in the exercise of its ordinary original civil jurisdiction can only entertain "suits for land or other immoveable property" if such land or property shall be situated, either wholly or in part, within the local limits of the ordinary original jurisdiction of the High Court. If the lands lie only partly within the local limits of the High Court's jurisdiction, the leave of the Court must be obtained before the suit is instituted (*g*). The High Court cannot exercise ordinary original jurisdiction with respect to lands not within its local limits, even though the lands are in the possession of the Court Receiver (*h*). A suit for foreclosure is a suit for land (*i*): as also is a suit for redemption (*j*): suits for redemption or foreclosure will therefore not lie in the High Court, unless the mortgaged lands are situated wholly or in part within the local limits of the jurisdiction, and unless, if they are only partially within the local limits, the leave of the Court has been obtained before the institution of the suit.

Although the Court has no jurisdiction over land or other immoveable property not within the local limits of the jurisdiction, and cannot adjudicate as to the right and title to such land, yet when a party is *personally* subject to the jurisdiction, the Court can declare whether or not such party holds the lands subject to a trust (*k*).

(*g*) *Shaik Abdool Hamed* v. *Promothonauth Bose.* 1 Ind. Jur. p. 218.

(*h*) *Denonath Sreemony* v. *Hogg*, 1 Hyde, p. 141.

(*i*) *Beebee Jaun* v. *Mirza Mahomed Hadee*, 1 Ind. Jur. p. 40. See *Blaquiere* v. *Ramdkone Dass*, Bourke, p. 319 (orig).

(*j*) *Lallmonee Dossee* v. *Judoonath Shaw*, 1 Ind. Jur. p. 319.

(*k*) *Bagram* v. *Moses*, 1 Hyde, p. 284.

When a case is removed from a Mofussil Court and tried by the High Court in the exercise of its extraordinary original civil jurisdiction, the law to be applied to the case is that which would have been applied to it by any local Court having jurisdiction therein (*l*). Thus when a suit for redemption instituted in Dacca was tried by the High Court in the exercise of its extraordinary original jurisdiction, it was decided according to the law which would have been applied if it had been tried in the Dacca Court, from which it was removed (*m*).

There was at one time some uncertainty in the Supreme Court as to the relief to which a mortgagee of lands whether within or without the local limits of Calcutta, is entitled on a mortgage not in the English form, but in one of the forms in common use in the Mofussil. The uncertainty was as to whether the decree ought to be for sale or for foreclosure. For a considerable period the decree in all cases was for a sale (*n*). But latterly the practice was to follow the intention of the parties, as evidenced by their contract; or if the intention could not be gathered from the terms of the agreement, to allow the plaintiff to make his election.

This rule, and the reasons on which it is founded, are laid down in the following judgment of the Court (*o*). "Three claims were brought before the Court, in each of which the plaintiff sought an order of foreclosure. Two of these were upon Bengali khuts; the third upon an equitable mortgage constituted by deposit of title-deeds and an English memorandum in writing declaring the purpose of the deposit. The Court took time to consider whether the relief to be granted on these securities in the

(*l*) Letters Patent of 1865, sec. 20.

(*m*) *Doucett* v. *Wise*, 2 Ind. Jur. p. 291.

(*n*) *Collydoss Gungapadhia* v. *Sibchunder Mullick*, Morton's Rep. 111.

(*o*) *Ramnarian Bose* v. *Ramcunny Paul*, and *Pertaubchunder Paulit* v. *Ashlam Holdar*, 24th December, 1851.

event of the non-payment of the sums found to be due thereon respectively, should be a sale or foreclosure. It appears that this Court has ordinarily given effect to Bengali securities of this nature by sale. There seems, however, to be no reason why, if the Bengali instrument, as many mortgage khuts or bye-bil-wufas do, actually import a conditional sale, intended to become absolute if the money be not paid by a certain time, this Court should not do what the Courts of the East India Company do in like case, and give effect to the security by a decree of foreclosure. The practice of this Court was, we believe, adopted in supposed conformity with the practice of the Court of Chancery in cases of equitable mortgages. The course of practice in England, however, as to the nature of the relief to be granted on equitable mortgages, has not been uniform. In some of the earlier cases the decree was for foreclosure, with a direction for an absolute conveyance by the mortgagor. There followed a period in which the ordinary decree was for a sale; and in one or two cases the sale was directed to be immediate. In *Parker* v. *Housefield* (*p*), however, Lord Cottenham when at the Rolls decided that whether the relief granted was sale, or whether it was foreclosure, the period of six months given for redemption by a decree on a legal, must be equally given by a decree on an equitable mortgage; and in most of the modern cases (*q*), the Court has reverted to the earlier form of decree, and directed a foreclosure and absolute conveyance. The form of order to be made on a claim founded on an equitable mortgage, as issued by the Court of Chancery and adopted by this Court, also shows that foreclosure is now considered in general cases the proper mode of relief. There are, however, exceptional cases: and such decisions as

(*p*) 2 Mylne and Keene, p. 419.

(*q*) See amongst others *Ball* v. *Harris*, 8 Simons, p. 485, confirmed on appeal, 4 Mylne and Craig, p. 264: *Tylee* v. *Webb*, 6 Beavan, p. 552; *Holmes* v. *Turner*, 7 Hare, p. 369.

Sampson v. *Pattison* (*r*) and *Lister* v. *Turner* (*s*) show, that if the security afford evidence that a sale and not a foreclosure was in the contemplation of the contracting parties, the relief granted will be the former. In the case of *Ramnarian Bose* v. *Ramcunny Paul*, we think there is such evidence. The parties have expressly stipulated that in the event of the non-payment of the money the property shall be sold. In this case therefore we think the decree should be for sale. In *Pertaubchunder Paulit* v. *Ashlam Holdar* the security says nothing about a sale; it does not clearly define what is to be done in default of payment, but it is termed a khut mortgaging lands, and there seems to us to be no reason why, if the plaintiff prefer it, he should not have the usual order of foreclosure. In the other case, the order may be the usual order of foreclosure on an equitable mortgage by deposit."

Whether the mortgage was by conditional sale or not, the mortgagee could in the Supreme Court recover the money advanced by him, with interest, on default being made by the mortgagor in payment at the appointed time. At first the Court seems to have entertained doubts on this point, and in one or two instances, it was held that when the terms of the contract implied that the mortgagee was to look to the land alone for payment, he could not recover the money debt (*t*). But it has long been established, that an action for money lent will lie on the expiration of the time limited, the mortgage being treated merely as evidence of the original loan (*u*).

Where the plaintiff after having obtained a decree in the Supreme Court, was obliged to have recourse to a Mofussil Court in order to have it carried out, the latter was bound to accept and to respect the subsisting decree;

(*r*) 1 Hare, p. 533.

(*s*) 5 Hare, p. 281.

(*t*) *Radachurn Seat* v. *Punchanund Sealmoney*, and *Ruggonauth Shaw* v. *Ramdun Deb Surmono*. Morton's Rep. pp. 233, 234.

(*u*) *Tilluckram Puckrassy* v. *Choitmachurn Naut*, and *Sopteram Day* v. *Punchanund Mitter*. Morton's Rep. pp. 230, 232, and 233 note (*b*).

the question which had been decided could be re-opened only in the Court which decided it. So long as the decree stood, "the Mofussil Courts have nothing to say to the nature of the transaction. Instead of acting upon their own laws governing private transactions, they will act on the more general rule which requires them to respect the judgments and proceedings of a Court of competent jurisdiction and authority" (*v*).

A decree for foreclosure having been given in the Supreme Court, the mortgagee sued in the Mofussil for possession of the land, but was resisted by the mortgagor, on the ground that the mortgage had been redeemed. The Court said: "the mortgage has been foreclosed; and therefore, no plea of payment of the amount on which the mortgage was effected, can be taken up in this Court, as the foreclosure was made under process of the Supreme Court. No question of the validity or maintenance of the order of the Supreme Court declaring foreclosure in favor of the appellant before us, in a suit to which the mortgagor himself was a party, can be raised in this Court" (*w*).

The Mofussil Courts will put the plaintiff in possession, on a suit brought by him for that purpose founded on a decree of the Supreme or High Court, although that decree was made in a suit, prior to the institution of which no notice of foreclosure was issued. Thus in a case tried by the late Sudder Court, the Judges said: "As we have a decree of the Supreme Court before us, cutting off by express decretal words the equity of redemption against the mortgagor's estate, there remains no room for the issue of the notice, admitting of such equity, to the representative of that estate" (*x*).

But decrees of the Supreme Court could not be enforced in the Mofussil Courts against any person, except the parties to the original suit, or their representatives. Therefore when the mortgagee sued the mortgagor alone in the

(*v*) S. D. A. 1847, p. 354: 1853, p. 859: 1856, p. 323.

(*w*) S. D. A. 1850, p. 458.

(*x*) S. D. A. 1853, p. 859.

Supreme Court, and got a decree for foreclosure, and afterwards brought a suit for possession, founded on this decree, against a third party whom he found in occupation of the lands, that party having purchased the mortgagor's rights before the institution of the suit in the Supreme Court, it was held that, as the defendant had not been a party to the original suit, the decree formed no ground for a claim against him in the Mofussil Court (*y*).

So it was held to be quite clear that a Supreme Court decree, obtained by a first mortgagee against the mortgagor, was not binding on, and could not be put in force against a second mortgagee in possession, he not having been made a party to the suit in the Supreme Court (*z*).

A judgment for the balance due on a bond, was obtained in the Supreme Court. The bond also expressly pledged as security for the loan, certain property therein specified, and the lender afterwards sued in a Mofussil Court to recover, by the sale of the property pledged, the amount for which he had obtained judgment. The defendants pleaded, that the lender having obtained a judgment of the Supreme Court which was for money only, could not afterwards be allowed to bring an action to have the lands sold. But the Court held, that "the mere fact of the decretal order of the Supreme Court making no allusion to the property, and containing no provision for its sale in execution, could in no way be construed to the prejudice of the lender's lien upon the property, or affect his right to bring the property to sale in satisfaction of his decree, free from the incumbrances which had since been created in respect of it" (*a*).

A mortgagee having obtained a decree of foreclosure in the Supreme Court, sued on it in the Mofussil for possession, bringing his suit against the person whom he found in occupation. The defendant pleaded that he had

(*y*) S. D. A. 1853, p. 210.

(*z*) S. D. A. 1853, p. 859. See N. W. P. v. 8, p. 316: S. D. A. 1850, p. 45.

(*a*) N. W. P. v. 8, p. 316.

bought the land from the mortgagor, subsequent to the date of the plaintiff's mortgage, but more than twelve years before the institution of the foreclosure suit. The Court ruled that the suit was barred by lapse of time, the defendant having been more than twelve years in undisturbed possession (*b*). So when a second mortgagee obtained a decree for foreclosure in a Mofussil Court, and had undisturbed possession under that decree for more than twelve years, a suit for possession brought by a first mortgagee, based on a decree of the Supreme Court, was held to be barred by the limitation rule, although instituted within twelve years from the date of his Supreme Court decree (*c*).

By section 6 of Act XIV of 1859 it is provided that "in suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt." The effect of this provision when read together with clause 12 of section 1 of the same Act, was to give a mortgagee suing his mortgagor in the late Supreme Court for possession of immoveable mortgaged property,—twelve years from the latest payment on account of the mortgage debt, within which to bring his suit. By section 18 of the Letters Patent of the High Court the provisions of the section referred to will be applicable in suits brought before the High Court in the exercise of its ordinary original civil jurisdiction.

(*b*) S. D. A. 1853, p. 210. (*c*) S. D. A. 1853, p. 546.

APPENDIX.

I.—PURE USUFRUCTUARY MORTGAGE. (*a*)

I WRITE this instrument of mortgage of talook Barnagore, in pergunnah Meerbhoom, in the District of Nuddeah, the net annual profit of which, after deducting the sum of Rs. 400 for the Government revenue, is Rs. 500. In consideration of my mortgaging to you the aforesaid talook, I borrow from you the sum of Rs. 1,200, re-payable with interest at the rate of 12 per cent. per annum. I will immediately put you in possession of the said talook, and you will collect the rents, &c. thereof: after paying the Government revenue from the said collections, you will apply the remainder to the payment of interest that will accrue due to you on the said sum, and in case there shall be any surplus after such payment of interest as aforesaid, such surplus shall be taken by you in part payment of the principal. You will so remain in possession of the aforesaid talook till the whole amount of the loan, together with interest at the rate aforesaid, is liquidated. Dated, &c.

II.—SIMPLE MORTGAGE.

I WRITE this instrument of mortgage of land situated in Aheeritola Street, in Shootanooty, which I purchased in the year 1820, (that is to say) 17 beegahs, 5 chittaks of land, bounded on the North by the house of Sibchunder Ghose, on the South by a garden belonging to Ramloll Sen, on the East by the house of Rammohun Dass, and on the West by the house of Sreekishen Bhose. In consideration of my mortgaging to you the aforesaid land, I borrow from you the sum of Rs. 1,600, which is to be repaid on the 16th March 1875 with interest at the rate of 12 per cent. per annum. Every partial payment, which I shall make on account of the said loan, I shall

(*a*) The first three precedents are nearly literal translations of mortgage bonds on which advances were actually made, and which were afterwards put in suit.

specify on the back of this instrument of mortgage, and no payments that I may make other than those specified on the back of this document shall be allowed to me (*b*). In default of my paying the abovementioned sum with interest, within the limited time, you will cause the aforesaid land to be sold and pay yourself by the proceeds thereof. I deposit with you the title deeds of the aforesaid land, which shall be returned to me on the re-payment of the aforesaid loan with interest. Dated &c.

III.—MORTGAGE BY CONDITIONAL SALE, KUT-KUBALA, OR BYE-BIL-WUFA.

I WRITE this instrument of mortgage of 6 beegahs, 2 chittaks of ancestorial rent-free land, in mouzah Borocota, in the District of Hooghly, which has for a long time been my property. The said land is bounded on the North by the house of Sibchunder Ghose; on the South by the house of Shamachunder Mullick; on the West by a pond belonging to Madhubchunder Paul; on the East by a piece of land belonging to Mahadeb Sircar. In consideration of my mortgaging the aforesaid land to you, I borrow from you the sum of Rs. 175, which is to be re-paid at the end of one year from this date, with interest at the rate of 12 per cent. per annum. In default of my paying the above-mentioned sum with interest, within the limited time, I agree to relinquish my interest in the aforesaid land and to put you in possession thereof as rightful owner and proprietor. I deposit with you the title deeds of the aforesaid land which shall be returned to me on the re-payment of the abovementioned loan with interest. Dated, &c.

IV.—ENGLISH MORTGAGE IN FEE, WITH POWER OF SALE.

THIS indenture, made the day of between A. B., of &c., (mortgagor) of the one part, and C. D., of &c., (mortgagee) of the other part, Witnesseth, that, in consideration of the sum of £ this day paid to the said A. B., by the said C. D., (the receipt whereof the said A. B., doth hereby acknowledge,) he, the said A. B., doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his executors, and administrators, that the said

(*b*) This condition will not be strictly acted on by the Courts. See *supra*, p. 44; S. D. A. 1853, p. 544: 8 W. R. p. 316.

A. B., his heirs, executors, or administrators, will pay to the said C. D., his executors, administrators, or assigns, the sum of £ (the principal), with interest for the same in the mean time at the rate of £ per cent. per annum on the day next (*c*), without any deduction. And This Indenture (*d*) also Witnesseth that, for the consideration aforesaid, the said A. B. doth hereby grant and release unto the said C. D., his heirs, and assigns, all those lands, tenements, messuages and hereditaments, situate in the Parish of , in the county of , delineated in the plan in the margin of these presents and specified in the Schedule hereunder written, together with all commons, ways, lights, waters, water-courses, rights, privileges, easements, advantages and appurtenances whatsoever to the said hereditaments, or any part thereof appertaining, or with the same or any part thereof held, used, or enjoyed, or reputed as part thereof, or appurtenant thereto: and all the estate and interest of the said A. B. in the said premises: To hold the said premises unto and to the use of the said C. D., his heirs and assigns. Provided always, that, if the said A. B., his heirs, executors, administrators, or assigns, shall pay unto the said C. D., his executors, administrators or assigns, the said sum of £ (the principal), together with interest for the same in the meantime at the rate of £ per cent. per annum, on the said day of next without any deduction, then the said C. D., his heirs, or assigns, will, at any time thereafter, upon the request and at the cost of the said A. B., his heirs, executors, administrators, or assigns, re-convey the said premises unto the said A. B., his heirs and assigns, or as he or they shall direct, free from incumbrances by the said C. D., his heirs, executors, or assigns. And it is hereby declared that the said C. D., his executors, administrators, or assigns, may at any time or times after the said day of next (*e*) without any further consent on the part of the said A. B., his heirs, or assigns, sell the said premises, or any part thereof, either together or in parcels, and either by public auction or private contract, and may buy in or rescind any contract for sale, and re-sell, without being responsible for loss occasioned thereby; and may execute and do all such assurances and acts for effectuating any such sale as the said C. D., his executors, administrators, or assigns, shall think fit; And that upon a sale by any

(*c*) Generally six Calendar months from the date of the mortgage.

(*d*) When the property mortgaged is situated in India, the words "which is executed in pursuance of, and intended to take effect under Act IX of 1842 of the Legislative Council of India," must be here inserted.

(*e*) The day for payment of the principal sum.

person or persons who may not be seized of the legal estate, the person in whom the legal estate shall be vested shall execute and do all such assurances and acts for carrying the sale into effect, as the person or persons by whom the sale shall be made shall direct: Provided nevertheless, that the said C. D., his executors, administrators, or assigns, shall not execute the power of sale hereinbefore contained, until he or they shall have given to the said A. B., his heirs, executors, administrators, or assigns, or left on the said premises, a notice in writing to pay off the monies for the time being owing on the security of these presents, and default shall have been made in such payment for six calendar months after giving or leaving such notice: Provided also, that, upon any sale purporting to be made in pursuance of the aforesaid power, no purchaser shall be bound to inquire whether the case mentioned in the clause lastly hereinbefore contained has happened, nor whether any money remains upon the security of these presents, nor as to the propriety or regularity of such sale; and notwithstanding any impropriety or irregularity whatsoever in any such sale, the same shall, as regards the purchaser or purchasers, be deemed to be within the aforesaid power, and be valid accordingly. And it is hereby declared that the receipt of the said C. D., his executors, administrators, or assigns, for the purchase monies of the premises sold, or any part thereof, shall effectually discharge the purchaser or purchasers therefrom and from being concerned to see to the application thereof, or being accountable for the non-application or mis-application thereof; And that the said C. D., his executors, administrators, and assigns, shall, out of the monies arising from any sale in pursuance of the aforesaid power, in the first place, pay the expenses incurred on such sale, or otherwise in relation to the premises; and, in the next place, apply such monies in or towards satisfaction of the monies for the time being due on the security of these presents; and then pay the surplus (if any) of the monies arising from such sale to the said A. B., his heirs, or assigns; And that the aforesaid power of sale and other powers may be exercised by any person or persons for the time being entitled to receive and give a discharge for the monies then owing on the security of these presents; Provided always, that the said C. D., his executors, administrators, or assigns, shall not be answerable for any involuntary losses which may happen in the exercise of the aforesaid power and trusts, or any of them. And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant with the said C. D., his heirs and assigns, that the said A. B., now hath power to grant and release all and singular the said premises unto and to the use of the said C. D., his heirs and assigns, in manner aforesaid, and free from incumbrances; And that he the said A. B., and his heirs, and every other

person lawfully or equitably claiming any estate or interest in the premises, will, at all times, at the request of the said C. D., his heirs, executors, administrators, or assigns, but at the cost of the said A. B., his heirs, executors, or administrators, execute and do all such assurances and acts, for further or better assuring all or any of the said premises to the use of the said C. D., his heirs and assigns in manner aforesaid, as by him or them shall be reasonably required. In witness whereof the said A. B. and C. D. have hereunto set their hands and seals the day and year first above written.

The Schedule to which the above written Indenture refers.

INDEX.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M

N.

O.

P.

R

S

T.

U.

V.

W.

Y.

Z.